

# AN INTRODUCTION TO THE COMPARATIVE STUDY OF PRIVATE LAW

*Second Edition*

These readings place side by side the principal doctrines of contracts, torts, unjust enrichment, and property of the United States, England, France, Germany, and China. They include code provisions, cases, and other legal materials that describe the law in force, and place these doctrines in their historical context, showing how the resolution of current issues depends upon how past issues were resolved. It both provides a road map of the private law of these jurisdictions, and shows how private law has been shaped by history, by the effort to solve common problems, and by differences in culture.

**James Gordley** holds the W.R. Irby Chair at Tulane Law School. He writes in the areas of comparative law, comparative legal history, and private law.

**Hao Jiang** is Assistant Professor of Comparative Law at Università Bocconi. He writes in the fields of comparative law, American corporate and contract law, and Chinese and European private law.

**Arthur Taylor von Mehren** was Story Professor of Law at Harvard Law School, and a leading scholar in comparative law and international private law.



AN INTRODUCTION  
TO THE  
COMPARATIVE STUDY OF  
PRIVATE LAW  
READINGS, CASES, MATERIALS

*Second Edition*

JAMES GORDLEY

*Tulane Law School*

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*Harvard Law School*



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# Preface

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This new edition places side by side the principal doctrines of contracts, torts, unjust enrichment, and property of the United States, England, France, Germany, and China. The materials have been chosen so that these doctrines can be examined from an historical, a functional, and a cultural point of view. Each doctrine is placed in historical perspective. One can ask to what extent differences in doctrines are due to differences in the common law tradition, the civil law tradition, and in the experience of a non-Western nation adapting Western law to its own needs. Cases are presented alongside code provisions and commentaries to enable one to compare the orthodox view of these doctrines with what courts actually do. Scholars who take a functional approach to comparative law, such as Arthur von Mehren and Hein Kötz, have observed similarities in what courts often show that they have found solutions to common problems, which are masked by formal statements of the doctrines that they apply. Finally, as the materials illustrate, some differences in doctrine reflect differences in culture, both among Western jurisdictions and between the West and China.

The innovation of the new edition is to cover Chinese law in the same way. Given the cultural, linguistic, and ideological differences, Chinese law continues to mystify Western lawyers. Some think of Chinese law as a purely Western legal transplant while others regard China as a unique jurisdiction governed by traditions that cannot be compared with those of the West. The truth, as this book has tried to illustrate, is somewhere in between. The Chinese legal system takes the form of a typical civilian jurisdiction but with its own distinct features. Among them are the way in which the role of state-owned enterprises changes the presuppositions of contract law, and the way Confucian ideals are translated, in tort law, into a new form of liability, and, in property law, into a more communitarian approach to rights.

Like the first edition, this edition is based on *The Civil Law System*, published by Arthur von Mehren in 1957. He wrote, in the Preface that “[t]his book had its beginning almost ten years ago” when he left the United States to study law at Zurich, Berlin, and Paris. Its “fundamental purpose was to give a student, having some common law training, an insight into the workings of the civil law system as typified by the French and German legal systems.” He and James Gordley produced a second edition in 1977. Coverage has changed. The book’s fundamental purpose is now to enable

students in civil law as well as common law systems, and in both China and the West, to gain insight into each other's law. Nevertheless, the inspiration is much the same. The comparative study of law must be based, not only on formal statements of rules by codes and commentators, but on what courts do. Differences among laws are to be found, neither in formal differences among rules, nor in easy generalizations about how "common law" and "civil law" – or Western and Chinese law – may differ.

JAMES GORDLEY

HAO JIANG

# Foreword

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For a long historical period, China had been an exporter of its legal system. Chinese traditional law (e.g. the Tang Code, 唐律) had influenced many Asian countries including Japan, Korea, and Vietnam. In Chinese traditional law, as T'ung-tsu Ch'ü (瞿同祖) concluded in his *Law and Society in Traditional China* (1961), the family and the class system were fundamental features. The law recognized that different laws are applicable to nobles, officials, commoners, and the “mean” people based on their social status. Much emphasis was given to status. Such a body of law corresponded with the doctrine of the Confucianists, who considered family and social status as the essential themes of *li* (礼) and the backbone of the social order.

Since the Opium War broke out in 1840, China and the two other east Asian countries, Japan and Korea, were obliged to face a major societal change that had never occurred in the past thousands of years. This change was a result of a clash of civilizations between the East and the West. As a result, the traditional laws in East Asia were replaced by Western style modern laws and China changed from an exporter to an importer of law. All three countries had to modernize their laws in order to survive. Since then, the civilian legal tradition became the main model for the three countries to follow. The traditional societies in East Asia changed accordingly, and have shown a movement similar to the one that Henry S. Maine described as *from status to contract*.

As to the contemporary private law in East Asia, as Zentaro Kitagawa (北川善太郎) described in “Development of Comparative Law in East Asia” (in Reimann and Zimmermann, eds, *The Oxford Handbook of Comparative Law* (2006), 259), “[t]he modern legal systems of Japan, Korea, and China were once all shaped by the reception of Western legal models, albeit to varying degrees and in a variety of ways.” “Korea will continue to adhere to the Pandectist approach. China is deviating from that approach and pursuing a more pragmatic course. And Japan is on its way to building its own civil law model but is still experimenting and deciding exactly which course to pursue” (Albert H.Y. Chen, *An Introduction to the Legal System of the People's Republic of China* (4th edn., 2011), 186). The Japanese Civil Code, as a hybrid of French civil law and German civil law, was amended and modernized in 2017, and in its appearance continues to follow the German style; Korea is still on the way to modernizing its Civil Code; the People's

Republic of China will have its Civil Code in 2020. By reception, the seeds of Roman law have been planted in the soil of East Asia.

Compared with Japan, the situation in China is much more complicated. Since 1840, China suffered constantly from the changes between reformation and revolution. From things to institutions and to culture, great changes have occurred. From the Qing Dynasty to the Republic of China and to the P.R. China, changes of governments were carried out through revolutions. Among the revolutions, there were many reformations. As a result, the Civil Code (1929) of the Republic of China, which is an Asian copy of German BGB, is now still applied in Taiwan area. In Hong Kong, common law prevails, supplemented by Chinese traditional law (customary law). In Macao, the 1966 Portuguese Civil Code was in force until October 1, 1999. Now Macao has its own Civil Code. In mainland China, a Civil Code will be enacted in 2020, by reorganizing, updating, and replacing the existing General Provisions of Civil Law (2017), Contract Law (1999), Tort Law (2009), Property Law (2007), Marriage Law (1980), and Law of Succession (1985).

Anything, whether it is a house or a system, may be demolished and rebuilt. However, the culture of a nation is different. The Chinese civilization has continued for five thousand years. One important reason for this continued existence is its culture. Chinese culture is sustainable, because it is inclusive. Chinese people are not “fools,” in the words of Rudolph von Jhering, “who would refuse quinine just because it didn’t grow in his back garden.” The reception of civil law in China is a good illustration. After wars, turbulence and setbacks, and the economic reform at the end of the 1970s, China had successfully reformed its economic system from a planned economy to a market economy, and follows a piece-meal approach towards the codification of a Chinese Civil Code. Great progress has been made. Today, China is of continually greater interest to the world. With a background of both Chinese culture and socialist market economy, Chinese civil law has become an attractive paradigm for comparative studies.

For the following reasons I would like to recommend this book, especially to law school students and scholars in the East Asia region:

Firstly, the new edition adds Chinese law as an object for comparative studies. More specifically, the book reviews the transition of Chinese traditional laws and describes its transformation in modern times. It includes both Chinese substantive law (Chinese contract law, tort liability law, and so forth) and the law of civil procedure. It not only includes positive rules in statutes in China, but also cases and Chinese scholarly materials. I believe it would be very helpful to those who are interested in Chinese law.

Secondly, following the mainstream Marxism legal theory, the nature of law is the reflection of the will of the ruling class. Every law has its class nature. Therefore, in 1949 the new government of China abolished all Kuomintang legislation as fraudulently constituted authority (伪法统). The huge vacuum in law was filled by policies of the Chinese Communist Party. For thirty years, the continuity of private laws and common elements of different private laws had been disregarded. This may be one reason why there is no civil code in mainland China until today. Through a comparative study of private law, people can discover not only the differences among private laws, but also their common features, and acquire a good understanding of the continuity of history. Therefore, I completely agree with André Tunc and Reinhard Zimmermann in emphasizing that, for students who read English, this book constitutes “an excellent tool enabling them to view law not parochially but from a wider perspective.”

Thirdly, for students who read English, this is a brilliant introductory textbook on the civil law system. Using my personal experience as an example, thirty years ago when I was a law student, I read and benefited greatly from *The Civil Law System* (2nd edn., 1977), the predecessor of this book. It still benefits me and today I remember parts of the book, such as Jhering’s criticism of conceptualism and Philipp Heck’s ideas on interest jurisprudence. For most Chinese law students, English is their first foreign language and very few students can read French or German. This has been a common obstacle for Chinese law students that shows no sign of changing. It is true for the past forty years and still will be true for at least the coming twenty years. Given such a reality, this book will undoubtedly continue to be a very useful textbook.

Fourthly, this book is a brilliant introductory textbook on comparative private law. It covers not only civil law; it also covers common law. In China, many law schools (e.g. Tsinghua University School of Law) have “Comparative Private Law” or “Foreign Private (Civil) Law” in their curriculums. This book serves as a perfect textbook for such courses. It certainly provides an effective tool to familiarize students with the English expressions of civil law terminology, basic rules, and institutions in common law, civil law (French law and German law), European Union law, and Chinese law, and methods of comparative study (such as a functionalist approach, a historical approach, and a cultural approach to comparative law).

SHIYUAN HAN

# Foreword

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**To James Gordley and Arthur Taylor von Mehren, *An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials* (1st edn., 2006)**

In his foreword to the second edition of Arthur von Mehren and James Gordley, *The Civil Law System* (1977), André Tunc commented on a sentence written by Roscoe Pound in the foreword to the first edition of that work (1957). Pound had stated categorically that the methods of the jurists “must have a basis in comparison.” To what extent, Tunc asked, have we heeded that injunction? His answer was gloomy. He described the story of our efforts aimed at legal unification as sad; and most attempts to improve our domestic laws were also not based on comparative study. Today, nearly thirty years later, we have reason to be more optimistic. Of course, the picture is very different in different areas of the world. But at least in Europe the scene has changed dramatically.

Private law in Europe is in the process of acquiring, once again, a genuinely European character. The Council and the Parliament of the European Communities have enacted a string of directives deeply affecting core areas of the national legal systems. Increasingly, therefore, rules of German, French, or English law have to be interpreted from the point of view of the relevant community legislation underpinning it. The case law of the European Court of Justice, too, acquires an ever greater significance for the development of German private law. The prospect of a codification of European private law is starting to be seriously considered; and as a precursor various “restatements” of specific areas of European private law have been published or are in the process of preparation. The internationalization of private law is also vigorously promoted by the uniform private law based on international conventions which cover significant areas of commercial law. The United Nations Convention on Contracts for the International Sale of Goods, in particular, has been adopted by more than sixty states. It has started to generate a significant amount of case law, and it has shaped national law reform initiatives. The Sales Convention has been elaborated by UNCITRAL, and it aims at the global harmonization of a core area of private law. But UNCITRAL is not the only international organization active in this field. UNIDROIT, too, continues to produce ambitious instruments such as the Principles of

International Commercial Contracts which have been widely noted, internationally, and which enjoy increasing recognition as a manifestation of a contemporary *lex mercatoria*. Every year, thousands of students spend a period of one or two semesters at a law faculty in another Member State of the European Union under the auspices of the immensely successful Erasmus/Socrates programme. Alternatively, or in addition, many students acquire additional, post-graduate qualifications in other countries. More and more law faculties attempt to obtain a “Euro”-profile by offering a broad range of language courses, by establishing international summer schools, or integrated programmes on an undergraduate and post-graduate level, by setting up chairs for, or research centres in, European private law. Legal periodicals have been created that pursue the objective of promoting the development of a European private law. Interest has been rekindled in the “old” *ius commune*, and legal historians are busy rediscovering the common historical foundations of the modern law and restoring the intellectual contact with comparative law and modern legal doctrine. New approaches to legal scholarship, often emanating from the United States, have gained ground in Europe; the economic analysis of law is probably the most prominent example. Legal practice, at the top level, has been all but revolutionized. A wave of mergers has swept over the legal profession and reflects its ever-growing international orientation.

It is widely accepted today that the Europeanization, or more broadly, the internationalization of private law decisively depends on an internationalization of the legal training provided in the various universities throughout Europe. For if students in their domestic law courses continue to be taught the niceties of their national legal systems without being made to appreciate the extent to which the relevant doctrines, or case law, constitute idiosyncracies explicable only as a matter of historical accident, or misunderstanding, rather than rational design, and without being made to consider how else a legal problem may be solved, a national particularization that takes the abracadabra of conditions, warranties, and intermediate terms, or of the doctrine of consideration, for granted, threatens to imprint itself also on the next generation of lawyers. Thus, what André Tunc said in 1977 remains true today: the law schools must ask themselves whether they cannot do more to broaden the frame of mind of their students. Courses on comparative law and on legal history play a key role in this context; at the same time, however, the comparative and historical approaches should permeate the ordinary courses in the various substantive areas of private law. This makes it necessary to develop teaching materials which make the most important sources and the most influential texts readily available. James Gordley’s and Arthur von Mehren’s *Introduction to the Comparative Study of Private Law* meets this need. In contrast to



its predecessor on *The Civil Law System* (first edition by Arthur von Mehren, second edition by Arthur von Mehren and James Gordley) it also covers the common law; that makes it a most attractive teaching tool for comparative law courses not only in the Anglo-American world but also in countries such as France and Germany. In addition, it provides texts and materials on the historical development of modern legal doctrine and thus demonstrates the close relationship between legal history and comparative law. And so it can now be said with even greater justification than in 1977 that, for students who read English, this book constitutes “an excellent tool enabling them to view law not parochially but from a wider perspective.” For a lawyer in the twenty-first century this kind of intellectual horizon is not only desirable but indispensable.

REINHARD ZIMMERMANN

# Foreword

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**To Arthur Taylor von Mehren and James Russell Gordley,  
*The Civil Law System An Introduction to the Comparative  
Study of Law* (2nd edn., 1977)**

In the masterly foreword that, as a token of esteem and friendship for the author, Dean Roscoe Pound gave to the first edition of this book, one sentence deserves our special attention and, indeed, should give us some concern: “Whether we are dreaming of a world law or thinking of the further development of our own law, to suit it to the worldwide problem of the general security in the present and immediate future, the methods of the jurists must have a basis in comparison.”

They “*must* have a basis in comparison.” To what extent in the last twenty years did we heed this injunction?

The story of the efforts to create a “world law” is sad; only disappointingly meager results have been achieved. In the field of civil liberties, jurists have no other weapons than hearts, mouths, and pens with which to oppose the frightening machines which crush bodies and minds. But there are other fields, such as trade law, where a “world law” is needed and does not encounter political obstacles. In these fields, parochialism is the impediment to unification of the law. This has proved, by itself, an often insuperable roadblock.

Have we then, at least, based on comparative study our efforts to improve our domestic laws to make them more responsive to the legitimate expectations of our citizens and to the needs of the future?

A totally negative answer would be unfair. In some special fields of law – securities regulation, for instance, under the influence of United States law – and even in more general fields such as torts or family law, juristic thinking has become increasingly international. For many countries, furthermore, encouraging examples could be given of valuable and sometimes systematic studies of foreign laws or institutions and of careful research on the lessons to be derived from such studies.

It remains true, however, that jurists use a comparative approach very little when one considers the importance that, rationally, such an approach should have. Of course, a deliberate effort is required to overcome the psychological difficulties, the language barriers, and the logistic problems that such an approach implies. But, just as no individual can claim to be wise

by himself, no legal system can be regarded as so advanced that it has little to gain from the study of foreign schools of thought.

Logistic problems have just been mentioned. They are, of course, very important. However, the *International Encyclopedia of Comparative Law*, when it is completed, will give to every English-speaking jurist easy access, not only to the laws, but to the trends of the laws of a great many countries. As the logistic difficulties are overcome in this and other ways, the law schools must ask themselves whether they cannot do more to broaden the frame of mind of their students and to equip them for a world where, as Dean Roscoe Pound had foreseen, international affairs occupy an increasingly large place.

The answer seems clear: much more is desirable. Much more could and should be done to cross-fertilize our legal systems and, above all, the minds of our students.

The first edition of this book has done a great deal to enlighten students trained in the common law about the civil-law system, as typified by the French and German legal orders. The author, Professor Arthur T. von Mehren, has performed the same task in his teaching. He deserves the gratitude of both common lawyers and civilians. In the preface of the first edition, he explained the way he had conceived the book. Very wisely, the second edition remains basically faithful to the original conception. For the second edition, Professor von Mehren has been joined by Dr. James R. Gordley, a young scholar with particular interest in comparative law. They have not merely brought the first edition up to date – which is already a rather formidable task – but have expanded the treatment of some subjects and treated some others for the first time. This has required the condensation or omission of certain topics handled in the first edition. Of greater interest and importance is the fact that at many points the authors have replaced quoted material by their own discussion of the matter in question. Due to such improvements, the book is, even more than in its first edition, a fortunate combination of technical, historical, and functional approaches.

Let us hope that an awakening to what is needed to prepare our students for the approaching 21st century will everywhere broaden the place given to the comparative study of law. For students who read English, this book will be an excellent tool enabling them to view law not parochially but from a wider perspective.

ANDRÉ TUNC

# Foreword

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**To Arthur Taylor von Mehren, *The Civil Law System: Cases and Materials for the Comparative Study of Law* (1st edn., 1957)**

Writing in a time in which methodology in the social sciences has become the prevailing approach, Professor von Mehren speaks of comparative study of law rather than of study of comparative law. That is, he would make the study of the legal order and of the body of authoritative precepts and authoritative technique of applying them to the adjustment of relations and ordering of conduct more effective for promoting and establishing an ideal order among men by comparison of significant features of the two matured systems of law in the modern world.

Study of the civil law system, of the Roman law and the codes of the Continental countries and lands in the New World settled by them had much vogue in America in the eighteenth and fore part of the nineteenth century. Kent and Story, who were the leaders in the development of our law in the formative era and along with Blackstone and Coke were its oracles, were learned civilians, and the exigencies of commercial law, for which Blackstone and Kent furnished no useful material, led to increasing use of civilian materials by text writers and courts. From commercial law a tendency to cite and rely upon the civilians spread to the private law generally. As late as 1860 the Court of Appeals in New York cited French authority upon a question of the law of fixtures. As late as 1880 Langdell, trained under Parsons in the fifties, included a discussion by Merlin in a summary of the law of contracts. To the Middle Ages the academic ideal of all Europe as the empire for which Justinian had been the law-giver, made Roman law was taken to be declaratory of the law of nature. But the great civilian treatises did not deal with the general run of questions which had to be decided by American courts in the formative era. In the end we developed treatises of our own on the basis of the English common law. The dominant historical school in the nineteenth century gave up the eighteenth-century law-of-nature idea and so Roman law could no longer be held declaratory. Moreover, the latter part of that century developed a cult of local law. For a time comparative law was in decadence.

With the passing of the hegemony of historical jurisprudence at the close of the last century there came a revival of comparative law. An idea of a comparative science of law got currency in

America through Lord Bryce's *Studies in History and Jurisprudence*. In fact all methods of jurisprudence must be comparative. But the use of civilian treatises by English and American analytical and historical jurists had led to attempts to force common-law institutions and doctrines into civilian molds which retarded their effective development. What has called for comparative method throughout the world is general economic unification and new means and methods of transportation and communication which have been making the whole world one neighborhood.

Jhering, emphasizing the effect of trade and commerce in liberalizing the strict law, vouched the introducing of Greek mercantile custom into the law of the old city of Rome. In the same way the law merchant, a characteristic product of the medieval faith in a universal law, was taken over into the common law in an era of general commercial development. In America increasing economic unification has put an end to the cult of local law. Today worldwide economic unification is challenging the self-sufficiency of systems of law.

Conditions of transportation and communication today make every locality all but the next door neighbor of every other. What happens anywhere is news in the next morning's paper everywhere. The world has become economically unified and law transcending local political limits is an economic necessity. Moreover, since the First World War we have been seeing attempts at political unification of the world and setting up of a world legal order.

Even more the worldwide development of industry, carried on with instrumentalities and under conditions increasingly dangerous to life and limb, and the mechanizing of every activity of life likewise threatening injury to every one, have been creating new legal problems calling for revision of old doctrines and finding of new means of promoting and maintaining the general security. Experience, which is no longer merely local, must be subjected to the scrutiny of reason and developed by reason, and reason, which in its very nature transcends locality, must be tested by experience. The wider the experience, the better is the test. Thus the science of law must increasingly be comparative. Whether we are dreaming of a world law or thinking of the further development of our own law, to suit it to the worldwide problem of the general security in the present and immediate future, the methods of the jurist must have a basis in comparison.

Not the least problem of legal education today is what to leave out of the regular curriculum. Above all the fundamentals of the lawyer's technique and the basic principles by which he must weigh the everyday controversies in which he is to assist clients in maintaining their rights and realizing their just claims, must be thoroughly mastered. Nothing should be allowed to detract from this minimum. But the many difficult and complicated problems

confronting the law, the lawmaker, the judge, and the practicing lawyer of today call for a science of law beyond what was required of the simpler jurisprudence of the past, and, it must be repeated, the method of that science, whether primarily analytical, historical, philosophical, or sociological, must use comparative law as its main instrument. For jurist, law teacher, and judge it is becoming more than a part of his general culture. As to the practicing lawyer, in our polity he is potentially law-writer, law teacher, legislator, or judge. Moreover, law is or ought to be a learned profession and at least an awareness of the technique, institutions, and organization of the legal systems of the other half of the legal world is part of what should make a learned lawyer.

It remains to note that Professor von Mehren gives us, not a setting side by side of detailed rules of law for comparison presumably to enable us to determine which is "the right rule." It was this sort of thing which brought comparative law into disrepute in the last century. He gives us instead material for comparison of the Continental codes with our system of judicially established and developed law, of comparing the administering method of the Continent with our own, and finally what is crucial for the development of our Anglo-American law to meet the conditions of maintaining the general security in the society of our time, materials for comparing with our own the reaction of the civil-law jurisdictions to social and economic change.

ROSCOE POUND

# Table of Abbreviations

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A.	Atlantic Reporter
All E.R.	All England Law Reports
Am. Dec.	American Decisions
App.	Appellate Court
App. Div.	Appellate Division
B. & C.	Barnewell and Creswell's Reports
Barn. & Adl.	Barnewell and Adolphus' Reports
BB	Betriebs-Berater
Best & S.	Best and Smith's Reports
BGHSt.	Entscheidungen des Bundesgerichtshof in Strafsachen
BGHZ	Entscheidungen des Bundesgerichtshof in Zivilsachen
Bull. civ.	Bulletin des arrêts de la Cour de cassation, chambres civiles
Burr.	Burrow's Reports
BVerfG	Entscheidungen des Bundesverfassungsgericht
C.A.	Court of Appeal
Cai.	Caines' Reports
Cal. App.	California Appellate Reports
Cal. Rptr.	California Reporter
Ch.	Chancery
ch. crim.	chambre criminelle
ch. civ.	chambre civile
ch. req.	chambre des requêtes
ch. soc.	chambre sociale
CLR	Commonwealth Law Reports
COM	Commission Proposal
D.	Recueil Dalloz
D.A.	Recueil Dalloz Analytique
D.C.	Recueil Dalloz Critique
D.H.	Recueil Dalloz Hebdomadaire de Jurisprudence
Dig.	Digest of Justinian

D.L.R.	Dominion Law Reports
D.P.	Recueil Dalloz Périodique et Critique
DR	Deutsches Recht
D.S.	Recueil Dalloz Sirey
EBVerfG	Entscheidungen des Bundesverfassungsgerichts
Eng. Rep.	English Reports
Ex.	Exchequer
F.	Federal Reporter
Fed. Cas.	Federal Cases
F.R.D.	Federal Rules Decisions
F. Supp.	Federal Supplement
Gaz. Pal.	Gazette du Palais
Gray	Gray's Reports
H.L.	House of Lords
Inst.	Institutes of Justinian
IR	Informations rapides
J	Jurisprudence
JCP	Juris Classeur Périodique
JR	Juristische Rundschau
JZ	Juristen-Zeitung
K.B.	King's Bench
L.R.	Law Reports
Met.	Metcalf's Reports
Mun. Ct.	Municipal Court
N.E.	Northeastern Reporter
NI	Northern Ireland Law Reports
NJW	Neue Juristische Wochenschrift
NJW-RR	Neue Juristische Wochenschrift- Rechtsprechungs-Report Zivilrecht
N.W.	Northwestern Reporter
N.Y.S.	New York Supplement
O.J.	Official Journal of the European Union
P.	Pacific Reporter
pan.	panorama de jurisprudence
P.C.	Judicial Committee of the Privy Council
Q.B.	Queen's Bench
Rev. trim. dr. civ.	Revue trimestrielle du droit civil
RGSt	Entscheidungen des Reichsgerichts in Strafsachen



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RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
S.	Recueil Sirey
S.C.	Session Cases
S.E.	Southeastern Reporter
So.	Southern Reporter
Strange	Strange's Reports
Super.	Superior Court
S.W.	Southwestern Reporter
T.L.R.	Times Law Reports
U.S.	United States Reports
VersR	Versicherungs Recht
W.L.R.	Weekly Law Reports
民一	Civil first instance
民终	Civil final (second instance)
民再	Civil retrial
民监	Civil supervision



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9.2.7.8, 6	45.1.137, 195, 244
9.2.8, 304	47.2.21.7, 302
9.2.8.1, 6	47.2.43, 560
9.2.8.pr., 6	47.10.15.1, 302
9.2.9.4, 6	47.10.15.2, 302
9.2.11, 459	47.10.15.7, 7
9.2.11.pr., 6	47.10.15.20, 5, 303
9.2.27.9, 6	47.10.15.21, 303
9.2.27.33, 6	47.10.15.22, 5, 303
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47.10.15.34, 5, 302	Canon law
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50.17.206, 526	C. 22 q. 2 c. 14, 249
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2.1.12, 557	Chinese Law
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3.14, 133	3A 3.13, 40
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4.3.16, 304	3A 3.6 and 7, 39
4.5, 441, 489	5B 2.6, 40
	6B 10.6, 40
	7A 23.1, 39
	7A 4.3, 39



# **INTRODUCTORY READINGS**





# I. TRADITIONS

## A. THE WEST

Some Western countries are said to have a “civil law system,” others a “common law system.” There are two differences. A modern difference is that today, civil law systems are generally codified. Private law, including the law of contract, tort, unjust enrichment, and property, is governed by the provisions of civil codes. In common law systems, most of private law rests on the decisions of judges. These decisions have authority: in new cases courts are supposed to follow the precedent set in earlier cases. Statutes have a higher authority: in case of a conflict between precedent and statute, courts are supposed to follow the statutes. Yet, for the most part, the statutes fill in the gaps and make corrections in the law made by courts.

The second difference is that the law of civil law systems was originally based on the law of ancient Rome. The law of common law systems was originally based on the decisions of English courts. We will first describe how the two legal systems originated. We can then better understand the role of codification.

### 1. The Civil Law Tradition

#### a. Roman Law

##### i. The Roman Jurists

##### The Jurists

The West has been shaped by two great intellectual traditions: Greek philosophy and Roman law. Ultimately, both influenced the development of the civil law. In the beginning, however, the two seemed to have little in common. They sought the answers to different questions and by different methods.

In philosophy, literature, art, and architecture, the Romans borrowed from the Greeks. In engineering, war, and law they were their own masters. In law, they produced a learned tradition in the hands of a distinct class of men with a specialized education: the jurists (*iurisconsulti*). There was no equivalent group in ancient Greece.

The jurists were not appointed by the state. They held no regular office. They did not become jurists by studying in a law school or university or by passing examinations.

A young man who wished to become a jurist would attach himself to an established jurist. He would listen as the older man discussed how the law

of Rome applied in actual cases or hypothetical cases that were raised for purposes of argument. The young man became a jurist when people began to seek his opinions as to the law.

The jurists played no direct role in the Roman procedure for settling disputes. In this procedure, as it had developed by the late Roman Republic, the first step for a party who wished to bring a lawsuit was to have a government official, called the *praetor*, appoint a judge (*iudex*) and issue an instruction (*formula*) telling the judge what to do. The instructions were very general. They might tell the judge that if Octavius had bought a horse from Titius for 100 sesterces and had not paid, Octavius must pay him that amount. Or they might tell the judge that if he found that Marcus had unlawfully damaged Julius' horse, he must pay its value. The judge would then listen to the parties or their representatives, consider whatever evidence he deemed relevant, and make a ruling. Surprisingly, there were no state officials charged with enforcing his ruling. The loser was expected to pay out of respect for law, out of the desire to maintain the respect of others, and out of fear of whatever harm the winner and his friends could do to him if he refused.

The *praetor* and the judge were prominent men, but neither had any specialized legal training. Neither did the representatives who argued on behalf of the parties. The *praetor* was chosen for a term of one-year, and the judge was appointed to resolve a particular case. The parties' representatives were not jurists. They were orators (*oratores*). They were trained in rhetoric, the art of making speeches, which had been perfected by the Greeks. One of the most famous was Cicero, who had studied Greek rhetoric carefully, and whose speeches to the Roman senate became models of the effective use of language. They were studied in the West, and, until perhaps a century ago, were known to everyone with a university education. But Cicero had no special training in law.

The *praetor*, the judge and the orators depended on the jurists for their knowledge of law. The *praetor* promulgated a list or edict at the beginning of his term of the types of instructions that he would issue to judges. He did so in consultation with the jurists, and on the basis of the lists of previous *praetors*, who had also consulted with jurists. The instructions were very general. To determine their meaning, judges and orators would again consult with jurists.

### Their Method

The jurists developed an intellectually sophisticated comprehensive body of law, the like of which the Western world, at least, had never seen. It was so sophisticated that many historians have thought that the Romans borrowed it from the Greeks, whom the Romans admired, and who were intellectually able philosophers. Nevertheless, a few comparisons will show how different the Roman method of reasoning was.

In discussing the branches of law that we call contracts and torts, Greek philosophers were concerned not with the specifics but with the underlying principles of justice. Aristotle distinguished distributive justice which provided each citizen with a fair share of resources, from commutative justice, which preserved his share. What was deemed a fair share would vary with the type of constitution: in an aristocracy, or rule by the best, the wiser and more virtuous would ideally have a larger share than others; in a democracy, or rule by the many, each citizen ideally would have an equal share.

Aristotle distinguished between commutative justice in involuntary and voluntary transactions. In involuntary transactions, one person enriched himself by taking another's resources, and the law required that he restore the victim to his original position. In voluntary transactions, each person exchanged resources, and commutative justice required that they exchange resources of equal value so that their share of resources stayed the same. Aristotle's distinction not only resembles the distinction between torts and contracts, but may be the origin of that distinction. Gaius (fl. 130–180 AD) was the first Roman jurist to distinguish between contract (*contractus*) and tort (*delictus*);<sup>1</sup> historians believe he was following Aristotle.<sup>2</sup>

Nevertheless, the Roman jurists were concerned with what we would call particular contracts and torts, each with its own rules. Having distinguished contract and tort, Gaius immediately turned to describing the particular contracts and torts recognized in Roman law and the rules peculiar to each.

The Romans did not have a general law of contract. When a contract was binding, for example, depended on what kind of contract it was. Some were binding on consent such as sale, lease, partnership and mandate (a contract in which one person does another a service without compensation). Some were binding when an object was actually delivered: for example, gratuitous loans for use or for consumption, gratuitous deposits for safekeeping, and pledges. Some were binding only if a formality was completed. Others were not binding until performance. An example was barter: one party agreed to trade his horse for the other party's mule. Eventually, a party who had performed could compel the other party to return his performance or to perform in return. The jurists understood that a party must consent in order to enter into any of these contracts. They did not explain why only some of them are binding on consent.

Similarly, Roman tort law was a law of particular torts. One was an action for *iniuria*: injuries to dignity or reputation, which the Romans explained by particular examples. A person could recover for *iniuria* if

1. G. Inst. III.88.

2. Reinhard Zimmermann, *The Law of Obligations Roman Foundations of the Civilian Tradition* (Capetown, 1990), 10–11; Max Kaser, *Römische Privatrecht* (Munich, 1959), 522; A.M. Honoré, *Gaius*

(Oxford, 1962), 100; Helmut Coing, "Zum Einfluß der Philosophie des Aristoteles auf die Entwicklung des römischen Rechts," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Rom. Abt.* 69 (1952), 24–59.

another composed or recited a song attacking him,<sup>3</sup> or if someone beat his slave.<sup>4</sup> He was liable for *iniuria* if he made an indecent proposal to a woman<sup>5</sup> or followed her “assiduously.”<sup>6</sup>

Another was an action under the *lex Aquilia*, one of the earliest plebiscites enacted by the people when they first acquired authority to make their own laws. The language of the law said that one had to make compensation for harm done “*iniuria*,” which, in this context, meant without right or unlawfully. The jurists decided that a person was liable only if he was at fault, either by causing the harm intentionally or negligently. This is the first time that a legal system adopted the general principle of liability for fault, and specified that one might be at fault in either of these two ways. That principle is to be found in all modern legal systems, and all of them, directly or indirectly, borrowed that principle from Roman law, including common law systems. Roman law, like most modern legal systems, also recognizes cases in which a person might be strictly liable, which means liable without fault.

Characteristically, the jurists explained fault by particular illustrations. A pruner is negligent if he harms someone by cutting off a branch over a public way without calling out.<sup>7</sup> If a farmer burns stubble and the fire gets out of control, he is negligent if he did so on a windy day but not if the day was calm and the fire spread because of a sudden gust of wind.<sup>8</sup> A javelin thrower is negligent if he kills someone by throwing it in an inappropriate place,<sup>9</sup> and so is the stoker of a furnace if a fire starts because he fell asleep instead of watching it,<sup>10</sup> and a barber who shaves a customer out of doors near a playing field and cuts him when a ball strikes the hand holding the razor.<sup>11</sup> So is one who digs a pit to catch a deer or bear in a public place where someone might fall in rather than in the usual place for such pits.<sup>12</sup> A mule driver is negligent if he is too inexperienced to control his mules,<sup>13</sup> as is a carter if he loaded stones badly so that one fell out of his cart,<sup>14</sup> and a doctor if he was too unskillful to perform an operation properly<sup>15</sup> or to prescribe the right drug.<sup>16</sup>

This method was not that of Greek philosophers. Aristotle, for example, discussed when, in principle, a person has done what is right or wrong. He explained that the source of his action must be in his intellect and will, since man is a rational animal who acts through reason and will. He is not responsible if some external force moves his arm so that it strikes someone else. Aristotle considered to what extent a person acts voluntarily when he acts under duress. He never discussed negligence.

Similarly, when the Greek philosophers discussed property, they discussed the justification for it. Plato proposed that in the ideal state, there

3. Dig. 47.10.15.27.

4. Dig. 47.10.15.34.

5. Dig. 47.10.15.20.

6. Dig. 47.10.15.22.

7. Dig. 9.2.31.

8. Dig. 9.2.30.3.

9. Dig. 9.2.9.4.

10. Dig. 9.2.27.9.

11. Dig. 9.2.11.pr.

12. Dig. 9.2.28.pr.; see Dig. 9.2.29.pr.

13. Dig. 9.2.8.1.

14. Dig. 9.2.27.33.

15. Dig. 9.2.7.8.

16. Dig. 9.2.8.pr.

should be no private property. Aristotle, who had been his pupil, argued that without private property, those who worked much would receive the same as those who worked little, and there would be constant quarrels over the use of things.<sup>17</sup> Centuries later, Aristotle's arguments were used to justify private property by medieval philosophers such as Thomas Aquinas and early modern philosophers such as Hugo Grotius. But the theories of Plato and Aristotle did not interest the Roman jurists. Their concern was not the principles that justify private property but with the rights that attach to various kinds of property and how these rights are acquired.

Again, they discussed particular situations. The sea and seashore are "common things" that belong to everyone, and so everyone can use them.<sup>18</sup> But an individual owns gems or pebbles he takes from the shore.<sup>19</sup> Moreover, an individual can build a hut on the shore.<sup>20</sup> Others must keep clear of the hut.<sup>21</sup> But his ownership lasts only as long as the building remains. If it collapses, someone else can build on the site.<sup>22</sup> Wild animals, birds, and fish belong to no one, but become the property of the person who captures them.<sup>23</sup> Rivers and harbors are "public things." They belong to the public, and everyone can fish or boat on them.<sup>24</sup> The river banks are owned by those whose lands border them, yet everyone using the river is free to beach boats, dry nets, and haul fish onto the banks, and to tie up to trees there even though the trees belong to the owner of the land.<sup>25</sup> Theaters and stadiums are "civic things." They belong to the citizen body as a whole, not to the citizens as individuals.<sup>26</sup> An individual citizen, however, has a right of action against anyone who prevents him from using them.<sup>27</sup>

Out of this attention to particulars grew what are still regarded as some of the basic distinctions of property law. One is between ownership and possession. Roman law protected not only the owner but the possessor of property. If someone takes the goods or the land that is in my possession, I do not have to prove that I was the owner in order to get it back from him. Who, then, is a possessor? Certainly, if I leave my land for an errand in a nearby village, I am still in possession of it: if I find that a stranger moved in while I was out I can get the land back without proving I was the owner.<sup>28</sup> Do I have to walk over every foot of the land to gain possession? Certainly not.<sup>29</sup> Is it necessary that I at one time did have physical possession? Suppose land that I purchased was pointed out to me from a terrace on neighboring property, or that goods were delivered to my door, but I had not yet touched them? According to the jurists, I was in possession.<sup>30</sup>

This method of the Roman jurists was at once concrete and abstract. It was concrete in that each example concerns a particular factual situation. It is abstract in that each factual situation is chosen to make a legal point, and the facts presented leave out everything that is not relevant to that

17. *Politics* V.ii 1263<sup>a</sup>.

18. I. 2.1.1; I. 2.1.5; Dig. 1.8.2.1.

19. Dig. 1.8.3.

20. I. 2.1.5; D. 1.8.3.

21. Dig. 1.8.4.

22. Dig. 1.8.6.pr.

23. I. 2.1.12.

24. I. 2.1.2; Dig. 1.8.5.pr.

25. I. 2.1.4; Dig. 1.8.5.pr.

26. I. 2.1.6; Dig. 1.8.6.1.

27. Dig. 47.10.15.7.

28. Dig. 43.16.1.24.

29. Dig. 41.2.3.1.

30. Dig. 41.2.18.2.

legal point. For that reason, it is hard to tell, reading the Roman jurists, whether they are describing a real case, but leaving out facts that they deem to be irrelevant, or whether they are inventing a hypothetical case, putting in only the fact relevant to the point they wish to make.

The Roman jurists were concerned with the meaning of concepts: ownership, possession, negligence, sale. But while the Greek philosophers explored the meaning of concepts by defining them, the Roman jurists did so in the way just described: by describing one situation after another in which the concept did or did not apply.

The concepts of the Greek philosophers were often new and technical, and had no meaning outside their own philosophies, but were meant to describe aspects of reality for which ordinary concepts were inadequate. Plato thought that the forms or abstract ideas of things were ultimately real. Aristotle thought that individual things were real, but each thing had an essence, an end, an efficient and a material cause. In contrast, the concepts that were fundamental to the Roman jurists were often taken from ordinary life. Indeed, they were often so common that one cannot easily imagine a society without them. In every society that has developed the use of money, people will buy and sell. In every society, children will be taught not to be negligent in handling sharp objects or fire. In every society, someone will sometimes possess something that is not his own: a bow, a pot, a skin. The genius of the Roman jurists was not to invent new concepts but to see the legal significance of ordinary ones, and then to make them precise by a string of particular examples.

### **The Work of Justinian**

For reasons that no one understands, the last great Roman jurists wrote no later than the third century AD. Their works continued to be read. As the Empire became more bureaucratic, Roman law was taught in law schools whose graduates staffed the courts that decided cases. Yet the classical age of Roman law was over. The teachers in the law schools confined themselves to the work of the classical jurists, without either adding to it or refining and systematizing it.

In the sixth century, after the western Roman Empire had fallen to barbarian invaders, the Emperor Justinian decided to preserve the work of the classical jurists while simplifying the law. His officials prepared a compilation of Roman law later called the *Corpus iuris civilis* (the body of civil law) which is sometimes referred to as “Justinian’s Code.” It was not a code in the modern sense. The largest part of it, the Digest, was more like a scrapbook. The compilers excerpted short quotations from the works of the classical jurists and arranged them roughly by topic. Two other parts of Justinian’s *Corpus* consisted of imperial legislation since the classical era. The last part was an edited version of an introduction to Roman law by the jurist Gaius.

It is said that the compilers examined ten thousand books on law, “book” meaning a scroll. Because Justinian provided that only his compilation would have the force of law, these scrolls were not recopied. All of them have been lost except for the introduction to law written by Gaius,



and it was only rediscovered in the nineteenth century. In the Empire, Justinian's compilation fell into disuse, and it was no longer copied. Indeed, only one copy survived. It had been left in Italy during one of the short intervals before imperial forces were driven out. If that one manuscript had been lost, the Roman legal tradition would have been lost as well, since it contains almost all that is known about Roman law.

## ii. The Medieval Jurists

### The Jurists

In the East, the Roman Empire endured until 1453, when its capital, Constantinople, was captured by the Turks. In western Europe the Empire was destroyed by barbarian invasions beginning in the fifth century. The next five centuries are remembered as the Dark Ages. In the late eighth century, Charlemagne, the king of the Franks, temporarily reunited much of western Europe. The Pope – the leader of the Catholic Church – recognized him as Emperor, a title that was borne by his successors. But his empire collapsed when a new series of invasions began in the ninth century. In the eleventh century, the invasions came to end, peace was restored, cities and trade grew, and a new civilization began to develop. Roman law was revived, and provided a legal system far more sophisticated and in tune with the needs of society than the law of the barbarians. From the very beginning of the revival, the teaching and interpretation of Roman law was the task of jurists. This time, however, the jurists were professors in universities.

According to a traditional story, around the year 1070, the surviving copy of the *Corpus iuris civilis* came into the hands of a man named Irnerius, who began to lecture on the Roman law in the city of Bologna in Italy. His four most prominent students were called “the four doctors of Bologna.” Later medieval jurists traced their pedigrees through them. It is unlikely that Irnerius was the first or the only one to lecture on Roman law. Nevertheless, the revival of Roman law began around 1100 in what Kenneth Pennington called “the big bang.”<sup>31</sup> The law school at Bologna became one of the first universities in the West, attracting students from all over Europe. Gradually, Roman law became accepted throughout most of the European continent as the “*ius commune*” – literally, a “common law” – binding whenever there was no local law to the contrary. The exception was England, where Roman law was never accepted; English “common law” developed on the basis of judicial decisions. After continental countries adopted civil codes, the Roman law was no longer a *ius commune* or common law of Europe. Today, the term “common law” is used to distinguish the law that developed in England from continental civil law.

In medieval Europe, as in ancient Rome, the jurists were a distinct class of men with a specialized education. Unlike the Roman jurists, they

31. Kenneth Pennington, “The ‘Big Bang’: Roman Law in the Early Twelfth-Century,” *Rivista internazionale di diritto comune* 18 (2007), 43 at 70.

acquired this education by studying in universities. The curriculum was the *Corpus iuris civilis* of Justinian, which they studied, text by text, over a period of four to five years. There were no entry requirements. Anyone could study who had learned enough Latin to do so. There was no university administration to appoint the professors. Anyone could give lectures if he had graduated from a university and received the title of *Doctor iuris* – Doctor of Law. There was no university budget. Professors were paid by their students, and so, to make a living as a professor, one had to attract a large number of students by being very prestigious or very popular. Classes were held, at first, in churches, which at that time were often used for many non-religious purposes. Students lived in inns, which became the first dormitories. The professors examined the students and conferred a doctor's degree on those who passed their examinations. The students formed associations to protect themselves against merchants who charged too much for food or inns that charged too much for lodging. These associations also ensured that the students were fairly treated by the professors. They fined professors who were late for their lectures, or who spoke too long, or who taught materials that were of interest more to themselves than to their practically minded students.

The Roman jurists had held no official position and had advised the *praetors*, judges, and orators who had no legal education but were engaged in administering the law. In contrast, in medieval Europe, wherever Roman law spread, cases were argued by lawyers and decided by judges with a university degree in law. Even where Roman law was not yet accepted, kings, nobles, and city authorities hired law graduates to help with the legal aspects of governing.

To be a jurist now meant to be an expert in law in a different way than in ancient Rome. The Roman jurists were experts in a law that was largely unwritten, or to be found in the writings of other jurists like themselves. There were few statutes, and the edicts or instructions of the *praetors* were general. A jurist was a person who, after years of study with an established jurist, could give his own opinion on questions of Roman law that other jurists would respect when asked how the law would apply to a certain factual situation. He would not cite any authority for his opinion except, possibly, the opinion of another jurist.

The medieval jurist was an expert on the texts found in the *Corpus iuris civilis*. He explained what these texts meant. The medieval jurists who were active from the twelfth to the mid-thirteenth centuries are called the Glossators because their writings consisted largely of *glossae* or notes written in the margins of manuscripts of the *Corpus iuris*. The notes might clarify an obscure term, or interpret a rule, or reconcile one text with a seemingly contradictory text that appeared elsewhere in the *Corpus iuris*, or simply list all the texts relevant to the same legal issue. The work of the Glossators culminated in the *Glossa ordinaria* or Standard Gloss compiled by Accursius (1182–1263). It contained over 100,000 individual glosses, many of them taken from the work of earlier Glossators. It had immense influence, and printed editions were still being published in the seventeenth century. Later jurists are referred to as Commentators because



they typically wrote commentaries on the *Corpus iuris* rather than notes in the margin. Two of the most famous were Bartolus of Sassoferrato (1313–1357) and his student Baldus degli Ubaldi (1327–1400). These commentaries, however, were commentaries on the Roman texts, and discussed these texts in the order in which they appeared in the *Corpus iuris*. Any question regarding one text was resolved by citing another. When, as often happened, a professor was asked to give an opinion on a case pending in court, he answered by discussing the relevant Roman texts. So did a judge in deciding a case, and a lawyer in arguing a case to a judge. An easy way to attack an opponent was to say, “he speaks without a text.”

### Their Method

The method of the medieval jurists was to interpret each text of the *Corpus iuris* in the light of every other. Such a method was not used only in law. It has been called “the scholastic method” – literally “the method of the schools” – and was used to study theology, philosophy, politics, ethics, and virtually every other subject taught in a medieval university. Each authority had to be reconciled with every other. In law, it was like the method that lawyers use today when they reconcile one statutory provision with another, or one judicial decision with another. In his book *The Renaissance of the Twelfth Century*, Charles Homer Haskins said that law is inherently scholastic.<sup>32</sup> The method works fairly well if the question is how to reconcile two conflicting rules or seemingly conflicting decisions about the right result to reach in similar factual situations. It works fairly well if one wants to reconcile the teachings of one philosopher with that of another. It does not work well if one wants to determine, for example, whether the earth moves around the sun or the sun moves around the earth.

In applying their texts to new situations, or in reconciling them with other texts, the medieval jurists necessarily gave these texts a meaning which the Roman jurists who wrote them did not consciously have in mind. For example, one Roman text said that a person who had sold land for less than half its just price had a remedy: he could demand that the buyer either make up the difference in price or rescind the transaction.<sup>33</sup> If the author of that text had some larger idea in mind, he did not say so, and there is really no way of knowing. The Glossators decided, however, that the text meant there would be a remedy, not only for buyers but for sellers, not only in sales of land but in sales of goods, and not only in sales but in similar transactions such as leases.<sup>34</sup> This remedy became known as one for *laesio enormis*,

32. Charles Homer Haskins, *The Renaissance of the Twelfth Century* (New York, 1957), 204–05.

33. C. 4.44.2.

34. The *Brachylogus*, written at the beginning of the twelfth century, does not speak of land but of objects sold. *Brachylogus* iii.xiii.8. The *Dissensiones dominorum* of the early thirteenth century reports a dispute in which all participants take it for granted that the buyer has a remedy. The disputed question is whether, for him to have it, the sales price

must be twice or one and one-half times the just price. The participants are said to be Placentinus and Albericus, who wrote in the twelfth century, and Martinus, a student of Irnerius. Hugolinus de Presbyteris, *Diversitates sive dissensiones dominorum* (ed. G Haenel, 1834), § 253. According to Accursius it was agreed among the jurists that the remedy would be available generally in contracts *bonae fidei*. *Gl. ord.* to C 4.44.2 to *auctoritate iudicis*.

literally, for “a very great harm.” The Roman text did not say what was meant by the just price. The Glossators solved that problem by looking to other Roman texts that dealt, for example, with the damages due for harm done through fault<sup>35</sup> or the fairness of sales made by a guardian on behalf of his ward.<sup>36</sup> The value of chattels was their price as of the time and place of sale, although, in opposition to his own view, Accursius cited text that concerned the difficulties of valuing a stolen cow.<sup>37</sup>

The development of a remedy for *laesio enormis* illustrates how, by reading a text broadly or narrowly, and by interpreting in terms of texts dealing with a different legal problem, the medieval jurists were able to build extensive doctrines, unknown to the Romans, on the basis of Roman texts. It also illustrates how the medieval jurists, like the Roman jurists, were not concerned with explaining the larger principles of justice that justified the solutions they reached. The Glossators never explained why contracts for land or goods should be made at a just price. That seemed to them the fairest interpretation of their Roman text, although they did not discuss why it was fair. They never explained why the just price was the market price at a certain time and place. It is unlikely that they had an explanation. Any other result, however, would have called into question thousands of seemingly normal market transactions, and to do so seemed to them to be wrong.

### The Influence of Canon Law

In the Middle Ages, a distinction was drawn between the secular or worldly authority of kings, princes, and other political authorities, and the spiritual authority of the Catholic Church. The secular authorities were concerned with peace, order, and justice in society. The spiritual authority of the Church was concerned with the salvation of people’s souls. The Canon law was the law of the Church. It dealt with how Christian leaders such as the pope, bishops, and priests are chosen and what authority they have. It dealt with the sacraments, which were rituals through which Christians received God’s help. It dealt with sin. A sinner had violated the laws of God and, if he wished to save his soul, he must seek forgiveness. He did so through the sacrament of confession in which he confessed his sin to a priest and asked to be forgiven. Canon lawyers spoke of confession as the tribunal of conscience, the “internal forum.” A Christian also might be charged with wrongdoing and summoned before a Church court – the “external forum” – where, as in secular courts, decisions were made by legally trained judges after hearing arguments by legally trained lawyers. The law they applied, however, was Canon law. The Canon law was based on a compilation of texts taken from the Bible, Church Councils, and Christian saints compiled in the twelfth century that became known as the *Decretum* or the *Concordance of Discordant Canons*. It was later supplemented by collections of decretals: decisions by popes as to how

35. *Gl. ord.* to C. 4.44.2 to *autoritate iudicis* citing Dig. 8.2.33.

36. *Gl. ord.* to C. 4.44.2 to *autoritate iudicis* citing Dig. 27.9.13.pr.

37. Dig. 13.1.14.3.

particular questions were to be resolved. These materials formed the *Corpus iuris canonici* (the body of Canon law).

There was an overlap in the jurisdiction of secular courts and Church courts because many of the injustices with which a secular court was concerned were also sins dealt with in the internal or external forum of the Church. A person might have to answer for the legal consequences of his actions before a secular court and for the spiritual consequences under the Canon law. Both Roman law and Canon law were taught at the same universities, and, indeed, the university study of Canon law also began in Bologna in the twelfth century. It was prestigious to have a “double doctorate”: a doctor’s degree in both Roman and Canon law.

The texts of the *Corpus iuris civilis* had been written by Roman jurists. The texts of the *Corpus iuris canonici* were, for the most part, written by non-lawyers and were based on religious traditions of Judaism and Christianity. Yet the two bodies of law influenced each other. The Canon law, for example, followed the Roman law in declaring that a person was at fault for harming another if he acted negligently or intentionally.<sup>38</sup> If he injured another by a complete accident, he had not sinned and did not need to be forgiven. What had been a rule concerning legal liability was thus recognized as one governing the conduct that was sinful. Similarly, the Canon law adopted the remedy that the medieval Roman lawyers had developed for *laesio enormis*.<sup>39</sup> A party who overcharged another or who underpaid had sinned, and in the external forum of the Church courts could be compelled to make up the difference or rescind the transaction.

Conversely, Canon law rules and doctrines sometimes made their way into the medieval jurists’ interpretations of Roman law. An example is what came to be called the doctrine of changed circumstances in contract law. The *Corpus iuris canonici* contained a passage in which St. Augustine discussed what a person should do if the owner of a sword had entrusted it to him and then asked for it back after he had become insane or wished to harm someone. St. Augustine said that the person entrusted with the sword should not give it back.<sup>40</sup> A Canon lawyer’s gloss to the passage concluded: “Therefore, this condition is always understood: if matters remain in the same state.”<sup>41</sup> Eventually, civil law jurists used that rule to explain why a party might no longer be bound to a contract if circumstances had changed. Another example is what came to be called the doctrine of necessity. The *Corpus iuris canonici* contained a passage from a sermon by St. Ambrose denouncing rich people for their greed, and declaring that no one should call his own what is common to all.<sup>42</sup> The Canon lawyers inferred from the text that in cases of severe necessity, a person did not sin if he used property to save his life without the owner’s permission. The doctrine was used to explain some of the particulars of Roman law: for example, why provisions became common property when passengers are shipwrecked.<sup>43</sup>

38. *Gl. ord.* to Dig. 50 c. 49 to *inculpabiles*; to Dig. 50 c. 51 to *Si duo*, citing Dig. 9.2.31.

39. X 3.17.3.

40. C. 22 q. 2 c. 14.

41. *Gl. ord.* to C. 22 q. 2 c. 14 to *furens*.

42. Dig. 47 c.8.

43. *Gl. ord.* to Dig. 47 c. 8 to *commune*.

### The Criticism of the Humanists

In the fourteenth century, the work of medieval scholars in law, philosophy, and almost every other branch of knowledge was challenged by a group we call the humanists. They hoped to achieve what they called a “renaissance” of classical learning, which, they thought, had been forgotten or corrupted during the “middle ages” as they called the period that separated their own time from the ancient world.

The difference, in part, concerned the goals of education. Their goal was not professional training. Nor was it the acquisition of a correct philosophical understanding of the nature of God, the universe, man, or even morality. It was a *studia humanitatis*, learning that would foster the development of a human being and so produce, in the words of their hero Cicero, a *vir virtutis*, a complete man, cultivated and fit for an active role in public life. Their method was to inculcate moral virtue, practical wisdom, and a correct and eloquent command of language through the study of classical languages and authors. The humanists, as Quentin Skinner said, gave “birth to a doctrine that was to be almost embarrassingly long-lived: the doctrine that a classical education not only constitutes the only possible form of schooling for a gentleman, but also the best possible preparation for an entry into public life.”<sup>44</sup> That doctrine began to break down in the nineteenth century and was abandoned with confidence only in the twentieth.

Although a classical education came to be regarded as the only possible form of schooling for a gentleman, legal education remained grounded in the texts of the *Corpus iuris civilis*. Nevertheless, the humanists disagreed with the medieval jurists about how those texts should be interpreted. The medieval jurists used the scholastic method. They tried to reconcile every text with every other to obtain what they regarded as sensible results. As we have seen, this method sometimes took them far beyond anything that the Roman jurists who wrote their texts consciously had in mind. In contrast, the humanists tried to recapture the original meaning of a text to its author. They invented what we now call philology. To understand the meaning of a word, they looked for every other instance in which it had been used by the same author or by his contemporaries.

One result of the new method was to produce editions of the *Corpus iuris civilis* that recaptured the original texts. Poliziano prepared a new edition by comparing the version in common use, which we call the vulgate, with the one extant manuscript from which all others had been copied. In the following century, humanist jurists built on his work. Guillaume Budé, Andrea Alciato, Jacques Cujas, and their followers discovered many instances in which the text of the *Corpus iuris* was corrupt. Errors had been made either by Justinian’s compilers or by copyists.

If the humanists had merely been seeking a more accurate version of the *Corpus iuris civilis*, their methods and those of the traditional medieval

44. Quentin Skinner, *The Foundations of Modern Political Thought: 1 The Renaissance* (Cambridge, 1998), 88.

jurists could have been accommodated. They had different goals, however, and the difference caused intense hostility. From the humanists' point of view, many of the interpretations of the traditional jurists were simply wrong. They had attributed a meaning to the texts that the Roman jurists who wrote them could not have had in mind. From traditional jurists' point of view, the humanists were neglecting the true task of a jurist, which is to apply legal texts to new situations. If, as the humanists implied, one could not do so without distorting the meaning of these texts, then the rule of law was impossible. It would be impossible for a legal text to govern any situation the lawmaker did not consciously have in mind. Because the methods of the traditional jurists were suited to this different task, the humanists, despite their intellectual prominence, had little influence on how law was actually applied even in their own day.

## b. The Natural Law Schools

### i. The Late Scholastics

Throughout the Middle Ages, legal study in the universities was based on the texts of the *Corpus iuris civilis* and, in Canon law, those of the *Corpus iuris canonici*. The teaching of many other subjects in the medieval universities was based on the works of the Greek philosopher Aristotle. His works on metaphysics, nature, politics, and ethics became available in the West in the late twelfth and early thirteenth centuries. Theologians such as Albertus Magnus and Thomas Aquinas synthesized them with Christian doctrine. In the fourteenth century, the poet Dante called Aristotle, "the master of all who know." His influence continued to dominate the universities until the rise of modern critical philosophy in the seventeenth century.

Nevertheless, the medieval jurists, even those who read and admired Aristotle, did not try to integrate his philosophical ideas with Roman or Canon law. The influence was only occasional. The same can be said of the influence of Roman law on the medieval philosophers.

A serious attempt to explain Roman and Canon law by Aristotelian philosophical principles was first made in the sixteenth and early seventeenth centuries by a group of philosopher-jurists centered in Spain which historians call the late scholastics. The school was founded at the University of Salamanca by Francisco de Vitoria (1492–1546) and Domingo de Soto (1494–1560). Among its leaders were Luis de Molina (1535–1600), Leonard Lessius (1554–1623), and Francisco Suárez (1548–1617). The late scholastics gave Roman law a systematic doctrinal structure for the first time.<sup>45</sup>

The late scholastics used the scholastic method of medieval scholars: they attempted to reconcile seeming conflicts among their authorities. Now, however, their authorities included the Roman and Canon law

45. James Gordley, *The Jurists: A Critical History* (Oxford, 2013), 84–101.

texts and the works of Aristotle. The task of reconciling was easier for them because of the distinction they drew between “natural” and “positive” law. Natural law was binding because it rested on principles of justice. Positive law was binding because it had been enacted by someone in authority, such as an emperor or king. Positive law could not contradict natural law, but it was a necessary supplement. Often many different rules would be consistent with justice, but one rule had to be adopted. That rule was binding only after someone in authority laid it down. When the late scholastics could explain a rule by showing that it was based on philosophical principles of justice, they said it belonged to natural law. When they could not, they said that the rule was one of positive law, enacted by the Romans or prescribed by the Church for some good reason, no doubt, but binding only where Roman law was in force, in the case of Canon law, binding only on Christians.

The doctrinal structure which the late scholastics developed, along with many of their conclusions, was adopted by Hugo Grotius, the founder of the northern natural law school and by later members of the school such as Samuel Pufendorf (1632–1694) and Jean Barbeyrac (1674–1744).<sup>46</sup> Much of it passed into modern law, although, as we will see in detail later on, some characteristically Aristotelian features did not.

The late scholastics and the northern natural lawyers organized their work like a modern treatise, topic by topic, unlike the medieval jurists, who discussed legal texts in the order in which they appeared in the *Corpus iuris civilis* or *canonici*. They began by discussing justice and law and then considered separate branches of law such as contract, tort, and property.

The late scholastics, followed by Grotius, reclassified the particular contracts of Roman law. Some, such as sales and leases, were governed by Aristotle’s principle of commutative justice in voluntary transactions. The parties exchanged resources, but commutative justice required that they exchange at a price that kept equal the share of resources that each party possessed. Following Aquinas,<sup>47</sup> they said that this principle explained the relief which, according to the medieval jurists, was given for *laesio enormis*: a deviation between the contract price and the just price of more than half. The reason for requiring such a large deviation was the practical need to protect the stability of commerce.<sup>48</sup>

Only some of the Roman contracts – sale and lease, for example – seemed to be acts of commutative justice. Following Aquinas,<sup>49</sup> the late scholastics explained that others were acts of liberality. Liberality, according to Aristotle, is a virtue manifested “in the giving and taking of wealth, and especially in respect of giving.” “[T]he liberal man will give for the sake

46. Gordley, *Jurists*, 128–40.

47. *Summa theologiae* II-II, Q. 17, a. 1, ad 1.

48. Domenicus de Soto, *De iustitia et iure libri decem* (Salamanca, 1553), lib. 6 q. 2 a. 3; Ludovicus de Molina, *De iustitia et iure tractatus* (Venice, 1614), disp. 348; Leonard Lessius, *De iustitia et iure, ceterisque*

*virtutibus cardinalis libri quatuor* (Paris, 1628), lib. 2 cap. 21 dub. 2; Hugo Grotius, *De iure belli ac pacis libri tres* (Amsterdam, 1646), II. xii.14 and 23; Samuel Pufendorf, *De iure naturae et gentium libri octo* (Amsterdam, 1688), V.i.8.

49. *Summa theologiae* II-II Q. 61, a.3.



of the noble and rightly; for he will give to the right people, the right amounts, and at the right time, with all the other qualifications that accompany right giving.”<sup>50</sup> There were, then, two kinds of voluntary arrangements: those based on commutative justice, in which each party obtained an equivalent for what he gave, and those based on liberality.

The late scholastics, followed by Grotius, concluded that, in principle, both of them were binding upon consent. They dismissed the Roman distinctions as to when contracts were binding as matters of Roman positive law. By voluntarily entering into a contract, one party gave the other the right to require performance. To deny him that right was a violation of commutative justice.<sup>51</sup> Nevertheless, they accepted the Roman rule that contracts to give away money or property were not binding without a special formality, which, by the Middle Ages, had become subscription to the promise before a legal official called a notary. That requirement ensured due deliberation.

According to the late scholastics, although all contracts were binding by consent, they were not binding, as the Canon lawyers said, when circumstances had changed. Following Aquinas, they explained the Canon law rule by Aristotle’s theory of equity. According to Aristotle, whenever a law is made, particular circumstances may arise in which the lawmaker would not want it to be applied. As a matter of “equity,” the law should not be applied in those circumstances. Aquinas concluded that similarly, promises are a kind of law one gives to oneself, and they are not binding in circumstances in which the parties would not have intended to be bound.<sup>52</sup> This explanation was adopted by the late scholastics.<sup>53</sup>

Tort, for the late scholastics, was governed by the principles that Aristotle had described in discussing commutative justice in involuntary transactions. If one person deprived another of resources, he must compensate the victim for the amount of his loss. The late scholastics, followed by the northern natural lawyers, concluded that the particular Roman actions for *iniuria*, or under the *lex Aquilia*, were instances of this general principle. As we have seen, Aristotle had said that since man is a rational animal, a person can truly be said to have done wrong when the action can be his intellect and will: he understood the action he was taking, and willed to do it anyway. Aristotle had been speaking of intentional actions. Aquinas applied Aristotle’s principle to negligent actions as well. The late scholastics concluded that, in principle, anyone who intentionally or negligently harms another’s person, property, or honor owes compensation.<sup>54</sup> Grotius restated that principle in a famous passage of his work: “From . . . fault, if damage is caused, an obligation arises, namely, that the damage

50. *Nicomachean Ethics* IV.i 1119b–1120a. A similar account was given by Aquinas. *Summa theologiae* II-II, Q. 119, aa. 2–4.

51. Molina, *De iustitia et iure* disp. 262; Lessius, *De iustitia et iure* lib. 2, cap. 18, dub. 8, no. 52; Grotius, *De iure belli ac pacis* II. xi.1.3–4.

52. Aquinas, *Summa theologiae* II-II, Q. 88, a. 10; q. 89, a. 9.

53. Lessius, *De iustitia et iure* lib. 2, cap. 17, dub. 10; cap. 18, dub. 10.

54. E.g., Soto, *De iustitia et iure* lib. 4, q. 6, a. 5; Molina, *De iustitia et iure* disp. 315, 724; Lessius, *De iustitia et iure* lib. 2, cap. 12, dubs. 16, 18; cap. 20, dubs. 10–11.

should be made good.” “Damage,” he explained, “is when a man has less than what is his . . . .”<sup>55</sup>

The late scholastics’ account of property was based on Aristotle’s explanation of why private property should exist. As we have seen, although Plato maintained that property should be held in common, Aristotle said that if it were, “[t]hose who labor much and get little will necessarily complain of those who labor little and receive or consume much.”<sup>56</sup> Following Aristotle, Aquinas explained that goods would be held in common except for the disadvantages that common ownership entails.<sup>57</sup> According to Soto, Molina and Lessius, in principle, originally, or by nature, all things are held in common. Private property was instituted to avoid the difficulties that Aristotle and Aquinas had described.<sup>58</sup> Grotius gave a similar account.<sup>59</sup>

Following Aquinas,<sup>60</sup> the late scholastics used that account to explain the Canon law doctrine of necessity. Although property was instituted to remedy the disadvantages of common ownership of external things, nevertheless, the paramount end of the use of these things is the preservation of human life. Therefore, Lessius said that private property was instituted “with a reservation to each person of this natural right to whatever is necessary to maintain his life.”<sup>61</sup> Soto and Molina took the same view,<sup>62</sup> as later so did Grotius and Pufendorf.<sup>63</sup>

## ii. The Northern Natural Law School

The method of Grotius, Pufendorf, Barbeyrac, and other members of the northern natural law school was not scholastic. They wrote in the elegant Latin favored by the humanists. They stated their principles in simple terms, and illustrated them with examples taken from Roman and Greek history and literature. They did not try to reconcile Roman and Canon law texts. Rather, Grotius claimed that he had made the principles of natural law clearer by discussing only these principles, and not the legal texts, which often contained rules of positive law. Moreover, Grotius did not try to show with the precision of a philosopher how the principles of natural law followed from more basic principles. To read the works of the late scholastics, a person needed to have studied Aristotle and Aquinas and to have a philosopher’s concern with the relationship of legal principles to justice and human nature. Grotius certainly believed the principles of

55. Grotius, *De iure belli ac pacis* II. xvii.1–2. For similar conclusions by other natural lawyers, see Pufendorf, *De iure naturae et gentium* III.i.2, III.i.3; III.i.6; Jean Barbeyrac, *Le Droit de la nature et des gens . . . par le baron de Pufendorf* (5th edn., Amsterdam, 1734), n. 1 to III.i.2; n. 1 to III.i.3; n. 4 to III.i.6. See generally Zimmermann, *Law of Obligations*, 1032–4.

56. *Politics* II. v.

57. *Summa theologiae* II-II Q. 66, a. 2.

58. Soto, *De iustitia et iure* lib. 4, q. 3, a. 1; Molina, *De iustitia et iure* disp. 20;

Lessius, *De iustitia et iure* lib. 2, cap. 5, dubs. 1–2.

59. Grotius, *De iure belli ac pacis* II.ii.2.

60. *Summa theologiae* II-II, Q. 66 a.7.

61. Lessius, *De iustitia et iure* lib. 2, cap. 12, dub. 12.

62. Soto, *De iustitia et iure* lib. 5, q. 3, a. 4; Molina, *De iustitia et iure* disp. 20.

63. Grotius, *De iure belli ac pacis* II. ii.6–7. See Pufendorf, *De iure naturae et gentium* II.vi.5.



natural law that he described were principles of justice that rested on human nature. He described that Aristotle held the first place among philosophers. But he did not draw directly on Aristotelian philosophy.

Instead, his goal was to explain the principles of natural law so that educated people could understand them without any specialized training in Roman law or philosophy. The medieval jurists wrote for other jurists. The late scholastics wrote for other philosophers. Grotius wrote for gentlemen with a humanist classical education. Indeed, he wished to make the study of law part of the *studia humanitatis* – the education that would fit a person for public life, not for a particular profession. To a great extent, he and his school succeeded in doing so. Their books were read by educated people throughout Europe and in the English colonies in America.

In the seventeenth and eighteenth centuries, Aristotelian philosophy came under attack with the rise of modern critical philosophy. At the same time, through the work of Grotius and the other members of the northern natural school, much of the structure and any of the doctrines of the late scholastics spread throughout Europe. They persevered even after the Aristotelian principles on which they originally rested were forgotten.

Much of the structure that the late scholastics gave Roman law was preserved as its Aristotelian foundations were forgotten. In the seventeenth and eighteenth centuries, jurists continued to distinguish between contracts to exchange and contracts to confer a benefit gratuitously, and to maintain that in principle, contracts of exchange required a fair price. The Roman distinctions as to when a contract is binding fell out of use. Jurists continued to speak of a general law of tort, in which a basic principle was that a person who suffered harm through another's fault should be compensated. They continued to speak of property as relative rather than an absolute right that must give way, for example, in circumstances of necessity. Indeed, much of this structure passed into the civil codes adopted in much of continental Europe in the nineteenth century. Filtered out, however, were ideas such as the just price in contract law or the doctrine of necessity in property law which conflicted with nineteenth century jurists' conviction that law ultimately had to be explained in terms of the will, whether it was the will of the parties or that of an owner.

### **c. Codification and the Rise of Positivism**

#### **i. France**

The French Civil Code was drafted after Napoleon Bonaparte came to power, calling himself First Consul. It became law in 1804 shortly after he had declared himself Emperor of the French. He claimed it would bring him more renown than all his military victories. He wished to be remembered in the same way as the great lawgivers of ancient times such as the Emperor Justinian.

The French Revolution had begun in 1789, and many of its ideals were still alive at the time Napoleon seized power. One ideal was nationalistic.

One code for all Frenchmen would replace the diversity of the laws of different French provinces, some based on Roman law, some on French customs. A national code would symbolize and cement national unity. Still another idea was republican: the people should be ruled by laws that they themselves would approve and understand. The code would be promulgated by the legislator. The task of the judges would be merely to apply it. The ideal was a code with provisions so simple that they could be understood by ordinary citizens. The revolutionary governments had tried to codify French law before Napoleon took power but they had never produced a draft that they could agree on.

Jean-Étienne-Marie Portalis, the chairman of the committee Bonaparte appointed to draft the code, did not believe this republican ideal could be realized. The code provisions by themselves could not resolve all or even most of the cases that came before French courts. “[N]o one pleads against a clear statutory text.”<sup>64</sup> He believed that when the provisions of the code were unclear, judges must return to natural law. “Law (*droit*) is universal reason, supreme reason founded on the very nature of things. Enacted laws (*lois*) are or ought to be only the law (*droit*) reduced to positive rules, to particular precepts.”<sup>65</sup> Consequently, to interpret the Code, judges should apply “equity,”<sup>66</sup> “universal equity,”<sup>67</sup> “natural reason,”<sup>68</sup> “principles,”<sup>69</sup> “doctrine,”<sup>70</sup> and “the natural light of justice and good sense”<sup>71</sup> – in short, they were to apply that “equity” which was “a return to the natural law in the silence, obscurity, or insufficiency of the texts.”<sup>72</sup> They could also consult “the learning of the entire class of men” trained in legal science who had produced “compendia, digests, treatises, and studies and dissertations in numerous volumes?”<sup>73</sup> Portalis was referring to compendia, digests, treatises, and studies and dissertations that had already been written, not to new ones that were yet to be written and based solely on the texts of the Civil Code. Portalis did not expect the Civil Code to be the sole authoritative source of French law. “Few cases,” he said, “are susceptible of being decided by a statute, by a clear text. It has always been by general principles, by doctrine, by legal science, that most disputes

64. Corps législatif, Discours prononcé par Portalis, séance du 23 frimaire, an X (14 déc. 1801), in P.A. Fenet, *Recueil complet des travaux préparatoires du Code civil* 6 (1827; reprinted 1968), 269.

65. Portalis, Discours préliminaire prononcé lors de la présentation du projet de la Commission du gouvernement, in Fenet, *Recueil* 1:467.

66. Présentation au Corps législatif. Exposé des motifs, par Portalis, séance du 4 ventose, an XI (23 fév. 1803), in Fenet, *Recueil* 6:359; Portalis, Discours préliminaire in Fenet, *Recueil* 1:474, 6:51.

67. Portalis, Discours préliminaire in Fenet, *Recueil* 1:475.

68. Présentation au Corps législatif. Exposé des motifs, par Portalis, séance du 4 ventose, an XI (23 fév. 1803), in Fenet,

*Recueil* 6:359; Portalis, Discours préliminaire in Fenet, *Recueil* 1:469.

69. Portalis, Présentation au Corps législatif, séance du 4 ventose, an XI (23 fév. 1803), in Fenet, *Recueil* 6:360.

70. Portalis, Présentation au Corps législatif, séance du 4 ventose, an XI (23 fév. 1803), in Fenet, *Recueil* 6:360; Portalis, Discours préliminaire in Fenet, *Recueil* 1:474.

71. Portalis, Présentation au Corps législatif, séance du 4 ventose, an XI (23 fév. 1803), in Fenet, *Recueil* 6:359.

72. Portalis, Présentation au Corps législatif, séance du 4 ventose, an XI (23 fév. 1803), in Fenet, *Recueil* 6:360.

73. Portalis, Présentation au Corps législatif, séance du 4 ventose, an XI (23 fév. 1803), in Fenet, *Recueil* 6:360.

have been decided. The Civil Code does not dispense with this learning but, on the contrary, presupposes it.”<sup>74</sup>

The first part of the draft was approved by the Conseil d’État and then submitted for approval to two legislative bodies which still existed under Bonaparte’s authoritarian regime: the Tribunat and the Corps législatif. It was attacked for contradicting the republican ideal of a simple code that everyone could understand and which judges would simply apply as written. Addressing the Conseil d’État, Cambacérès warned that “it could facilitate usurpations by the courts of legislative power,”<sup>75</sup> and Roederer raised similar concerns. In the debate in the Tribunat, the Code was attacked by Malia-Garat for violating the republican ideal:

The law in a Republic is an emanation of sovereignty. It is the work of the people by itself or through its representatives that the constitution has established to make law. Law is the national will . . . [T]hat is why it is the only power that free human beings can acknowledge . . .

. . .

The origin of the law in a republic does not permit any human power to change the law or to modify it in its execution or to supplement its insufficiency, let alone its silence.<sup>76</sup>

The Tribunat could debate legislation but could only recommend that it be enacted or not enacted. It was a body of 100 members appointed by a senate controlled by Bonaparte’s supporters. Nevertheless, it rejected the portion of the draft that had been submitted to it. The Corps législatif consisted of 300 members, also chosen by the senate, which voted in secret and without debate, and had the power to decide if a law should be enacted. It also rejected the portion of the draft submitted to it.

Bonaparte then withdrew the remaining portions from further consideration, reduced the Tribunat to fifty members by eliminating his opponents, and resubmitted the draft. This time it was approved.

Despite all that Portalis had said, in the nineteenth century, the conviction grew that the Code should be interpreted exegetically without looking beyond its own texts. The reason was not a revival of the revolutionary ideal in France. It was the spread of legal positivism throughout Europe and America. For French positivists, legislation was the only source of law. So, strangely enough, they regarded the Civil Code as self-sufficient even though its drafters had not intended it to be. They believed that cases could be decided by logical inference from the Code. These were not merely the views of those who still believed in the revolutionary principles of the French Revolution. They were the views of nearly all jurists liberal or conservative.

**74.** Portalis, Discours préliminaire, in Fenet, *Recueil* 1:471.

**75.** Conseil d’État, Procès-verbal de la séance du 14 thermidor, an IX (2 août 1801), in Fenet VI, 23.

**76.** Tribunat, Opinion du Tribun Malia-Garat, séance du 19 frimaire, an X (10 déc. 1801), in Fenet VI, 151, 162.

The French jurists gave quite different reasons for reaching what was essentially the same conclusion. François Laurent thought that the natural law is revealed to the human conscience progressively as a people approaches perfection. The legislator, however, was supposed to anticipate by interpreting statutes and noting their defects.<sup>77</sup> Raymond-Théodore Troplong<sup>78</sup> and Auguste Valette<sup>79</sup> contented themselves with general remarks about how perfect and complete the French Civil Code was. Charles Demolombe agreed that, with a Code so complete, humane, and equitable, a case could scarcely arise in which natural law would be any different from positive law. Moreover, while there was a pre-existent, universal, and immutable natural law, to think about such a law was more appropriate to a philosopher or a moralist than a jurist. For a jurist writing about the Code, the one true law was the positive law.<sup>80</sup> Charles Aubry and Charles Rau claimed that, while there were absolute and immutable principles such as the personality of man, the right of property, the constitution of the family, and the liberty and obligatory force of contracts, one could not determine *a priori* the rules by which these principles should be developed. While the principles were immutable, the rules were contingent and variable.<sup>81</sup>

The one point on which the French did agree was that their task was to interpret the Code exegetically and in so far as possible without recourse to the natural law in which many said they believed.<sup>82</sup> Demolombe took as his motto: "The texts before all else."<sup>83</sup> From the point of view of a jurist, he explained, there is only one true law, the positive law.<sup>84</sup> Troplong praised the jurist who measured his writings by the inflexible text of the Code.<sup>85</sup> Valette advised restraint in using principles of equity to interpret it.<sup>86</sup> Laurent claimed that the jurist should merely note defects in the Code, thus leaving to the legislator the task of bringing it into accord with natural law.<sup>87</sup> Aubry and Rau gave an account of interpretation which made no reference to natural reason or equity.<sup>88</sup>

77. François Laurent, *Principes de droit civil français*, 1 (Paris, 1875), §5.

78. Raymond-Théodore Troplong, *De la vente* 1 (Paris, 1837), preface, p. xii.

79. Auguste Valette, *Cours de Code Civil* 1 (Paris, 1872), 34–5.

80. Charles Demolombe, *Cours de Code Napoleon* 1 (Paris, 1854–82), §§ 8–10.

81. Charles Aubry and Charles Rau, *Cours de droit civil français d'après la méthode de Zachariae*, 1 (4th edn., Paris, 1869–71), §2, n. 2.

82. See André-Jean Arnaud, *Les Juristes face à la société du XIX<sup>e</sup> siècle à nos jours* (Paris, 1975), 53–60.

83. Demolombe, *Cours* 1: 1st preface, p. vi.

84. Demolombe, *Cours* 1: § 8.53.

85. Troplong, *De la vente* 1: preface, p. viii.

86. Valette, *Cours* 1:4. While acknowledging that the judge must consult general principles of law to find a solution when statutory provisions are absent, Valette maintained that it would be astonishing to find a case in which these provisions were wholly lacking given the legislation enacted in the previous 70 years (1:34–5).

87. Laurent, *Principes* 1: §§ 5, 30. For a judge to decide a case by natural law is permissible only when the texts are insufficient, and then it is a necessary evil (§§ 256–7.)

88. Aubry and Rau, *Cours* 1: §§ 40–1.

## ii. Germany

The view that became orthodox in nineteenth century Germany was developed by Friedrich Karl von Savigny. He opposed codification. He regarded the French Civil Code as a collection of provisions with no underlying unity. Consequently, its provisions could not be interpreted. They were not based on higher principles of “natural equity,” as Portalis had thought.<sup>89</sup> There were no principles of natural law or equity that were sufficiently definite to be of use.<sup>90</sup> Nor could unity come from the foresight of the legislator. Savigny argued, like Portalis, that it would be impossible for the Code to provide for “each [particular case] by a corresponding provision . . . [T]his undertaking must fail because there are positively no limits to the actual variety of actual combinations of circumstances.”<sup>91</sup>

According to Savigny, the Roman texts did possess an underlying unity. The reason, strangely enough, was that they expressed the German *Volksgeist*, the mind or spirit of the German people. The texts were authoritative because they had been received in Germany because the *Geist*, the mind or spirit, of the German people, had embraced and accepted them.<sup>92</sup> The *Volksgeist*, the unconscious mind or spirit of a people, is the source of its law.<sup>93</sup> It is manifested in “the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin.”<sup>94</sup> The law owes its authority to this “common conviction” or “consciousness of an inward necessity.”

For Savigny, because the Roman texts were expressions of the German *Volksgeist*, the law was to be found by exegesis of these texts. Underlying the texts, he believed, was a system of fundamental legal concepts united by logical implication. “In every triangle,” he said, “there are certain given features from the relations of which all the rest are deducible . . . In like manner, every part of our law has points by which the rest may be given: these may be termed leading axioms.”<sup>95</sup> The difficulty was that “to distinguish them, and to deduce from them the internal connection . . . is one of the most difficult problems of jurisprudence. Indeed, it is peculiarly this that gives our work a scientific character.”<sup>96</sup>

The school that Savigny founded has been called that of *Pandektenrecht* – the law of the Roman Digest (also known as the Pandects) – because it was based on the Roman texts. It has also been called the school of *Begriffsjurisprudenz* – the jurisprudence of concepts – because its goal was to identify the legal concepts underlying the texts and to work out their logical relationship and their logical consequences. During the nineteenth century, members of this school did so with extraordinary tenacity. Their effort to give private law a systematic doctrinal

89. Friedrich Carl von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg, 1840), 74–6.

90. Savigny, *Vom Beruf*, 74–6.

91. Savigny, *Vom Beruf*, 38.

92. See James Whitman, *The Legacy of Roman Law in the German Romantic Era*:

*Historical Vision and Legal Change* (Princeton, 1990), 125–31.

93. Karl Friedrich von Savigny, *System des heutigen Römischen Rechts* 1 (Berlin, 1849), § 8, p. 19.

94. Savigny, *Vom Beruf*, 8.

95. Savigny, *Vom Beruf*, 38.

96. Savigny, *Vom Beruf*, 38.

structure was as intense and as thoroughgoing as that of the late scholastics. The late scholastics, however, had based their doctrines on principles of Aristotelian philosophy concerning human nature and justice. The nineteenth century German jurists did not base their doctrines on the principles of any particular philosophy. As we will see, one of their basic concepts was the freedom of the will. But Savigny sharply distinguished the legal concept of will from any philosophical conception: "We in the area of law are not at all occupied with the speculative difficulties of the concept of freedom. For us, freedom is based simply on the appearance, that is, on the capacity, of making a choice among several alternatives."<sup>97</sup> For Savigny, the law set limits to the freedom of each person, but the limits were to be found by interpreting the Roman texts, and the ultimate source of law was the *Volksgeist*. Bernhard Windscheid, one of the leading members of the school that Savigny founded, said that "[e]thical, political or economic considerations are not the business of the jurist as such."<sup>98</sup>

Consequently, in some ways, the presuppositions of the nineteenth century German jurists were like those of the French positivists. Neither based their conclusions on the principles of any definite philosophy. Neither believed that there were higher principles of natural law that were sufficiently definite to be of use. Both claimed that their conclusions were derived by logic from sources that had legal authority in their own nation. For the French, these sources were the provisions of the French Civil Code. They had authority because they were enacted by the legislator. Their conclusions were supposed to follow logically from the texts of the Code. For the Germans, the sources were the Roman texts. They possessed authority because they were expressions of the German *Volksgeist*. They were to be interpreted logically, first, by discovering the concepts underlying the texts, and then by showing the conclusions that followed from these concepts.

Eventually, however, German law was codified. Germany was unified under the Prussian monarchy in 1870 through the statesmanship of Chancellor Otto von Bismarck and the success of the Prussian army in defeating two major powers that would have opposed unification: Austria in 1866 and France in 1870. The king of Prussia became the Emperor of Germany. In 1873, the Constitution of the German Empire was amended to extend the power of the federal government over the entire field of private law. In 1874, a federal council (*Vorkommission*) recommended that the drafting of a civil code be entrusted to a large number of legal scholars and practicing lawyers from all parts of the Empire. In the same year, the so-called "First Commission" was appointed with eleven members: six judges, three government officials, and two law professors, Bernhard Windscheid and Gottlieb Planck. In contrast to the commission that drafted the French Civil Code, which completed its work in three months,

97. Savigny, *System*, 3: 102.

98. Bernhard Windscheid, "Der Aufgabe der Rechtswissenschaft," in

Bernhard Windscheid, *Gesammte Reden und Abhandlungen* (Leipzig, 1904), 101.



the First Commission met regularly for thirteen years without making its work public until a draft was completed in 1887.

In the 1870s, codification no longer aroused the same opposition as at the beginning of the century. One reason, as in France, was nationalistic: a national code symbolized national unity. Another reason was that German jurists believed that they could draft a code that had the unity necessary, as Savigny had said, for its provisions to be interpreted. That conviction was based, in part, on the success of the *Pandektenschule* in systematizing private law. The first draft of the code was based largely on principles which that school had found in the Roman texts.

Indeed, the first draft was attacked by those who were critical of the conceptual approach of the *Pandektenschule*. Some believed that its provisions were too technical and its concepts too abstract. Some, such as Otto von Gierke (1841–1921) denied the premise of the *Pandektenschule*: that concepts taken from Roman law could be truly acceptable to the German people.<sup>99</sup> Some, such as Anton Menger, attributed the use of concepts such as the will of the individual to political liberalism, which he believed was antagonistic to social concerns.<sup>100</sup>

In response to the criticism, a Second Commission was appointed to revise the draft. It consisted of ten permanent members who were members of the legal profession, including two professors, Plank and Gustav von Mandry, who replaced Windscheid who had resigned from the First Commission. There were also twelve non-permanent members: a professor of law, a professor of economics, business men, and the owners of large estates. The non-permanent members generally deferred to the jurists. In contrast to the First Commission, the Second issued weekly reports on its work. It completed a second draft of the code in 1895. The structure was like that of the first draft but the provisions were revised to reflect pragmatic concerns. In 1896, after further revisions by the legislature, the Code was enacted, and came into force January 1, 1900.

Despite the pragmatism of the Second Commission and the revisions by the legislature, the Code was thought to contain a unified system of principles which could be applied to resolve all of the cases that its provisions did not deal with specifically. According to the drafters:

No law can be complete in the sense that it has for every conceivable relationship falling within the limits of the legal material handled by it an obvious directly applicable provision. It would be a mistake to strive for such completeness. The Civil Code must, in case of need, be enlarged out of itself, out of the system of law (*Rechtssysteme*) that it contains. It does not contain a dead mass of legal materials placed in conjunction with each other, but instead an organic structure of innerly related norms. The principles that are basic to the Code carry the germ of further development in themselves. This

99. Otto von Gierke, *Der Entwurf eines Bürgerlichen Gesetzbuchs und das deutsche Recht* (Leipzig, 1889).

100. Anton Menger, *Das bürgerliche Recht und die bestizlosen Klassen* (1891).

development is by way of analogy . . . If no result can be reached by this process of analogy then the decision must be drawn from the spirit of the whole law considered as one system. To give decisive importance to the natural law here . . . is precluded because this “law found by an a priori construction, whose content in each case is only what the person construing it considers to be true,” does not permit objective legal norms to be derived from it. Nor can the law varying by territory, which was in force at the time of the enactment of the Code, or one of the territorial laws, be considered as a subsidiary law . . . [T]he decision may not be based on considerations that lie outside of the positive law (*das positive Recht*). The factual nature of the relationship must be placed under the norm which arises logically from the principles basic to the positive law and from the factual situation considered in its particularity.<sup>101</sup>

The drafters claimed to have written a code which could be a complete and self-contained expression of the entire law. They claimed, like the French positivists, that all cases could be decided by referring to the Code alone. That goal, as we have seen, is one that Portalis, who chaired the committee that drafted the French Civil Code, deemed to be impossible. So did Savigny, unless, by hard thought, the law could be reduced to a logical system of concepts in which, there are “leading axioms” “by which the rest [of the law] may be given,” just as in mathematics, “[i]n every triangle, there are certain given features from the relations of which all the rest are deducible.”<sup>102</sup> The drafters did not claim the German Civil Code consisted of leading axioms from which the rest of the law could be deduced as in mathematics. They said that the Code could be “enlarged out of itself” by analogy or from “the spirits of the whole law considered as one system.” The Code was a single system because it was “an organic structure of innerly related norms.” This inner relationship was not that of logic alone, as in mathematics, nor did it rest on natural law, nor, as Savigny said of the Roman texts, was it an expression of the *Volksgeist*. The drafters said little more than that the Code contained a system, and that it must contain a system for all cases to be decided by referring to the Code alone.

### iii. Conceptualism in France and Germany

We look back on the nineteenth century as an age of positivism. We also look back on it as an age of conceptualism. The two are related. For a positivist, the only source of law is the legal texts in force in a jurisdiction, whether they are the provisions of codes, or Roman texts, or, in the Anglo-American common law, judicial decisions. Those texts must be a complete and self-contained expression of the law. For a conceptualist, the task of a jurist is to identify and define the fundamental concepts on which the law rests. Once they are defined, the results in particular cases can be deduced

101. *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich I* (Tübingen, 1888), 16–17.

102. Savigny, *Vom Beruf*, 38.



from them. Conceptualism thus explained how the texts in force could be a complete and self-contained expression of the law. Underlying these texts were fundamental concepts to be identified and defined; the results in particular cases followed from these concepts.

In the nineteenth century, the French jurists claimed to be interpreting the provisions of the French Civil Code. The German jurists claimed to be interpreting the Roman texts. Yet they defined the basic concepts of private law in much the same way. Contract was defined in terms of the will of the parties. Property was defined as the will of the owner to do as he chooses with what belongs to him. The nineteenth century jurists thus developed what we call “will theories” of contract and property. Tort law was based on the principle that one who harms another’s right through fault, whether intentionally or negligently, is obligated to make compensation. The nineteenth century jurists gave little explanation of why one should owe compensation or what distinguishes fault from chance except that it is the basis for accountability.

Jurists had always recognized that contracts are entered into by the will of the parties. For the will theorists, the sole source of the parties’ contractual obligations was the parties’ will, and, again, in principle, these obligations were unqualified. Civil law had recognized the fault of a party as a reason he might be liable, but for the nineteenth century jurists, liability based on fault became an axiom. Jurists had always recognized that it is characteristic of private property that the owner has the right to do as he chooses with what he owns. Otherwise the institution would be meaningless. For the will theorists, however, this right was unqualified in principle, and it defined the meaning of private property.

The principles just described were congenial to the philosophical liberalism of the nineteenth century. For the liberal philosophers, in understanding man or society, a key concept was will. Many historians have assumed that the jurists arrived at these principles through the influence of philosophical liberalism. Nevertheless, there is no reason to think that they did.

On even a cursory view, the will theories seem different than other intellectual movements that stressed individual choice. The views of philosophers, economists, and political liberals were the subject of endless disputes, no single view winning out. The will theories, in contrast, enjoyed an easy and universal acceptance. They were espoused by both liberal and tradition-minded jurists.

Moreover, liberal philosophers differed as to what choice is and why it is important. Their views were as different as those of Jeremy Bentham (1748–1832), for whom all choices were made to seek pleasure and avoid pain, and Immanuel Kant (1724–1804), who believed that all moral choices were made by disregarding pleasure and pain and doing one’s duty. The jurists, in contrast, defined contract and property in terms of will without explaining what the will is or why it matters.

In Germany, Savigny, who was one of the principal architects of the will theories, was also one of the most philosophical of German jurists. Like

Kant, he said that law exists to protect freedom.<sup>103</sup> But neither he nor his followers rested their theories on a specifically Kantian conception of will. Similarly, Valérie Ranouil observed in her study of the French will theorists that they seem hostile to philosophy, that they never cite Kant, and that, until the end of the nineteenth century, they never even speak of the autonomy of the will.<sup>104</sup> She concluded, nevertheless, that the will theorists must have been using the concept of autonomy “without perceiving it.”<sup>105</sup> It would be more reasonable to conclude that the will theorists were not drawing on the ideas of Kant or any other philosopher as to why the will was important.

One reason that they reached similar conclusions is that they faced similar intellectual problems. They were trying to define legal institutions without regard to the purposes that these institutions are established to serve. By definition, promises are to be kept; by definition, the owner has the exclusive right to the use of his property; it is axiomatic that compensation is due for harm caused by fault. Consequently, the jurists encountered similar difficulties. When legal institutions are defined without regard to their purposes, one cannot explain why there are exceptions when the purposes of the rules are not served. There is no way to explain, in terms of the purposes of these institutions, why sometimes a promise need not be kept because of changed circumstances, or why compensation is not due for every harm and sometimes is due regardless of fault, or why sometimes one may use another’s property even against his will because of urgent necessity. As we will see, one problem which courts in different legal systems struggle with is how to escape the difficulties that the will theories created.

## 2. The Common Law Tradition

### a. The Writ System

The common law is based, not on Roman legal texts or codes, but on cases decided by judges. Peter Stein has noted that the work of the Roman jurists and that of the common law judges was similar in that it depended on the use of particular cases.<sup>106</sup> But it would be a mistake to think that the method of the English judges who founded the common law was like that of the Roman jurists. They were using their cases in very different ways.

The Roman jurists used cases to clarify the meaning of general concepts such as ownership, possession, fault, sale, and lease. Traditionally, English judges used cases to determine the boundaries of the writs recognized by the common law courts.

The common law courts were the king’s courts. To bring a case before them, the plaintiff had to obtain a “writ” from the royal chancellor. If the plaintiff were denied a writ, it did not mean that he had not been wronged

103. Savigny, *System*, 1: 331–2.

104. Valérie Ranouil, *L’Autonomie de la volonté: naissance et évolution d’un concept* (Paris, 1980), 9, 53–5, 79.

105. Ranouil, *L’Autonomie*, 70.

106. Peter G. Stein, “Roman Law, Common Law and Civil Law,” *Tulane L. Rev.* 66 (1992), 1591 at 1591–2.

unjustly or that he should not have a remedy. It meant that he could not receive a remedy from the king's courts. He must bring his case somewhere else: in the feudal courts of knights or barons, in the Church courts, in the courts of a town, in the merchants' courts.

At first, the chancellor created new writs as new cases arose which, in his judgment, the royal courts should hear. Eventually, the number of writs became fixed, so that by the fourteenth century no new writs were being created. Until the nineteenth century, to obtain relief, the facts of the plaintiff's case had to fit one of the existing writs, often called the "forms of action."

Common law procedure was divided into two stages. During the first stage, the parties argued before the king's judges in London whether the plaintiff was entitled to a writ, given the facts of his case. If the judges determined that he was, then the second stage was a trial of the facts in the locality in which the wrong supposedly had occurred.

In the first phase, the plaintiff alleged that he was entitled to a certain writ. For example, he might plead that on a certain day at a certain place the defendant had struck him with a stick, thereby committing "assault and battery by force and arms in violation of the king's peace." On these facts he would be entitled to a writ of "assault and battery." If the defendant had harmed or taken away his goods, he would be entitled to a writ called *de bonis asportatis*; if he had entered or harmed the plaintiff's land, to a writ called *quare clausum fregit*, and so forth. The defendant then had three choices. He could "traverse," which meant that he could deny the facts that the other party alleged: for example, that he had ever struck the plaintiff. He could "demur," which meant that he could concede the facts of it but claim that he should prevail anyway. Or he could "plead new matter" which meant that he could allege additional facts which, if true, might entitle him to prevail: for example, that he struck the plaintiff with a stick because the plaintiff had attacked him with a knife. If he pled new matter, the plaintiff then had the same three choices: to traverse, to demur, or to plead new matter.

The pleading phase ended when one of the parties either traversed or demurred. If he traversed, the lawsuit went to the second phase: there was a trial to determine the truth of the facts that were in dispute. If he demurred, there was no second phase. The judges would decide whether the plaintiff was entitled to a writ. For example, if the plaintiff demurred after the defendant alleged that the plaintiff attacked with a knife, the judges would decide in favor of the defendant. The reason, we would now say, is that the defendant acted in self-defense. The reason, so far as the common law judges were concerned, was that on these facts the plaintiff was not entitled to a writ of assault and battery. The English judges, unlike the Roman jurists, never developed a substantive law that was sharply separated from the procedural question of what writ the plaintiff could bring. As Sir Henry Maine said of the writ system, substantive law was secreted in the interstices of procedure.<sup>107</sup>

107. Henry Maine, *Dissertations on Early Law and Custom* (London, 1883), 389.

If a party traversed, then a trial was conducted in the locality in which the wrong had allegedly been committed. Beginning in the thirteenth century, the procedure was a trial by jury. One of the king's judges would appear in the locality, assemble twelve people who lived there, and have them swear an oath to determine the truth of the facts in dispute. If the defendant had denied attacking the plaintiff, they would determine whether he had done so. For centuries, the jury reached its conclusion without hearing evidence or arguments from lawyers. The jurors lived in the neighborhood. They were supposed to know what happened.

Later, the procedure was quite different. Only those who had no previous knowledge of the events in question were allowed to be members of the jury. They listened to the testimony of witnesses. The parties' cases were presented to them by lawyers. The judge would instruct them on the law before they reached their decision as to which party should prevail. A lawyer might object the judge's instructions, in which case the merits of the objection would be determined by the judges in London. Procedure had taken its modern form in a trial followed by an appeal, and the appeal by a judicial decision.

The common law had been the law of the thirteen British colonies which declared themselves independent in 1776 and became the United States of America. After the Revolution, the thirteen colonies became federal states. The common law remained in force in each. In the United States, the common law remains state law, although some parts of it have been replaced by federal statutes.

## **b. Transformation in the Nineteenth Century**

### **i. The Rationalization of the Common Law: From Writs to Legal Doctrines**

The great historian Frederic William Maitland once said that when the history of the common law is finally written, we will understand how the common lawyers arrived at "the great elementary conceptions, ownership, possession, contract, tort and the like."<sup>108</sup> He believed that these conceptions were gradually developed as common law judges decided whether the plaintiff was entitled to one of the writs or forms of action recognized in common law. As Charles Donahue has said, "we know a considerable amount more today than we did when Maitland wrote . . . What we have learned, however, is puzzling. Relatively little of the history of the forms of action seems to deal with 'the great elementary conceptions,' like ownership, possession, tort and contract."<sup>109</sup> Indeed, it was not until the nineteenth century that the common lawyers arrived at the "elementary conceptions" familiar from Roman law: mutual consent in the

<sup>108</sup>. Frederic William Maitland, "Why the History of English Law is Not Yet Written," in *The Collected Papers of Fredric William Maitland*, 1 (Cambridge, 1911), 480 at 484.

<sup>109</sup>. Charles Donahue, "Why the History of Canon Law is Not Written," Selden Society lecture delivered in the Old Hall of Lincoln's Inn, 3 July 1984 (London, 1986), 6.

formation of contracts; liability for fault as distinct from strict liability in torts; the protection of possession as distinct from ownership in property law.

In the nineteenth century, in England and the United States, these concepts were introduced as part of a great effort to rationalize the common law. The writ system was abolished. Supposedly, the change merely affected procedure. The plaintiff no longer had to name the writ under which he sought relief. He pleaded the facts of his case, and the judges were supposed to give relief when he would have been entitled to it under any of the traditional writs. The substantive law was not supposed to change.

Yet the substantive law did change. The traditional writs were reorganized into categories long familiar in civil law. Writs called “covenant” and “assumpsit” were now classified as contract law. Moreover, for the first time, the common lawyers said that contracts were based on mutual assent, that contracts therefore required an offer and acceptance, and that consent was vitiated by mistake. The writs of assault and battery, *de bonis asportatis*, and *quare clausum fregit* were now classified as remedies in tort. For the first time, the common lawyers distinguished between liability based on fault and strict liability, and, distinguished intentional fault from negligence. For the first time, English courts distinguished clearly between ownership and possession.<sup>110</sup>

In this rationalization of the common law, a key role was played by university professors and the writers of treatises. In 1758, William Blackstone was appointed the first Vinerian Professor of English Law at Oxford University. Previously, the common law was not taught in English universities. They taught civil law. Those who wished to become lawyers prepared by “reading law” in the offices of lawyers. In 1765, Blackstone published the first volume of his *Commentaries on the Law of England*. Systematic treatises on the law of contracts and torts were only written in the nineteenth century, among the most influential by Sir Frederick Pollock (1845–1937).

## ii. Positivism and Conceptualism

Along with the legal doctrines borrowed from civil law came the two approaches to law characteristic of civil law jurists in the nineteenth century: positivism and conceptualism.

In England and the United States, the authoritative texts were the decisions of judges. Like the continental lawyers, the Anglo-American jurists also sought a legal science, and one that owed its certainty to its grounding in authoritative texts. The decided cases were the law. Judges and commentators only explained what the cases meant, and if they did more, they would be making law themselves.

<sup>110</sup> The English courts were never clear about whether they were protecting ownership or possession until the Court of Queen’s Bench decided *Asher v. Whitlock*

in 1865, 1 L.R. 1 Q.B. In that case, the court allowed a prior possessor to recover land to which it was clear he did not have title.

The texts were not to be explained without reference to higher principles concerning human nature or the end of society. According to Christopher Columbus Langdell, "Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with facility and certainty to the ever tangled skein of human affairs, is what constitutes a true lawyer."<sup>111</sup> The principles of this science were to be found in the decided cases. Sir Frederick Pollock thought that principles or purposes beyond the law as declared by the state were of no concern to jurists. "Their business is to learn and know, so far as is needful for their affairs, what rules the State does undertake to enforce or administer, whatever the real or professed reasons for these rules may be."<sup>112</sup> He complained that a book by his contemporary Lorimer, *Institutes of Law*, "deals with topics which, according to the English view, may be philosophical, or ethical, or political, but are distinctly outside the province of jurisprudence."<sup>113</sup> "The morality of men living in settled societies," according to Pollock, was "an existing and sufficiently ascertained fact. It is for the moralist and metaphysician to analyze it if they can; it is enough for us that it is there."<sup>114</sup>

Positivism took a different form in England and the United States than in France and Germany. The texts that were authoritative for common law judges were not the written texts of a Code, as in France, or of Roman law, as in much of Germany. They were the prior decisions of other common law judges. These decisions were precedents that the court was obligated to follow. The transformation in the common law just described was possible because of the method the common lawyers adopted for interpreting precedent. The results of past cases were assumed to be correct, but the principle or rule for which a case stands might be one never envisioned by the judge who decided that case.

Suppose the facts of a case are a, b, and c, and the judge deciding this case states a rule: "when the facts are a, b, and c, the plaintiff should recover." In a later case, a judge might find for the plaintiff when facts a and b are present but c is not, and state a different rule: when the facts are a and b, the plaintiff should recover. In another case, a judge might find against the plaintiff in a case in which facts a, b, c, and d are present. He might state still a different rule: when one of the facts is d, the plaintiff cannot recover. The decision by each of the later judges is logically consistent with the decision by the earlier judge. Each is respecting the outcome of the first case but explaining it by a different rule. As an American jurist would say, the law is made by what judges do, not by what they say. A lawyer is always permitted to distinguish a later case by pointing to a fact that is present or absent that was not present or absent in the case

111. Christopher Columbus Langdell, *A Selection of Cases on the Law of Contract* (Boston, 1879), viii.

112. Frederick Pollock, *A First Book of Jurisprudence for Students of the Common Law* (London, 1896), 26–7.

113. Frederick Pollock, "The Nature of Jurisprudence Considered in Relation to

Some Recent Contributions to Legal Science," in Frederick Pollock, *Essays in Jurisprudence and Ethics* (London, 1882), 1 at 19–20.

114. Pollock, "Nature of Jurisprudence," 25–6.



already decided. He may argue that the difference calls for a different result. A judge who agrees is not questioning the precedent established by the prior case. He is recognizing, however, that the judge in that case only had the power to decide the case before him. He did not have the power to say what the result should be on facts he was not confronting. Americans have always been fonder of this explanation of the force of precedent than the English, who attach far greater importance to the rule as stated by the prior judge. Yet the transformation of English law in the nineteenth century was only possible because both English and Americans read principles into decided cases that judges before 1800 did not have in mind.

In one respect, this method of the common lawyers resembles that of Savigny and his school. The first step was to identify principles which, according to the common lawyers, explain the results in particular cases, and which, according to Savigny and his followers, explain particular Roman texts. For the nineteenth century jurists, in England and the United States as in Germany, these principles were to be defined in terms of concepts, and new cases could be resolved by working out the implications of these concepts.

Again, along with positivism came conceptualism. In the nineteenth century, Anglo-American jurists defined contract in much the same way as their continental contemporaries. Contract was defined as mutual assent.<sup>115</sup> As A.W.B. Simpson said, the will of the parties became “a sort of Grundnorm from which as many rules of contract law as possible were to be inferred.”<sup>116</sup> Fault was held to be necessary for a plaintiff to recover for bodily harm.<sup>117</sup> A property right was defined by Sir Frederic Pollock, a complete property right was the “exclusive and effective control of a thing in the highest degree possible, for this includes the power to deal with the thing, within the bound of what nature allows, at one’s wills and pleasures.”<sup>118</sup>

Like the civil lawyers, they did not explain why the law should enforce the will of the parties, or why a person should be liable for harm he caused by fault rather than chance. Oliver Wendell Holmes disapproved. He proposed an “objective” theory of contract in which the will of the parties did not matter, and denied that tort liability was based on fault. If “a man is

**115.** James Kent, *Commentaries on American Law* 2 (Boston, 1884), \*477; Dodd, “On the Construction of Contracts – Assent – Construction,” *The Legal Observer* 12 (1836), 249 at 249–50; Carey, “A Course of Lectures on the Law of Contract: Lecture I,” *The Law Times* 4 (1845), 463 at 505; Theophilus Parsons, *The Law of Contracts* 1 (Boston, 1860), \*399; T. Metcalf, *Principles of the Law of Contract* (New York, 1878), 14; Sir Frederick Pollock, *Principles of Contract* (London, 1885), 23–4; Stephen Martin Leake, *Elements of the Law of Contract* (London, 1867), 12; William Reynell Anson, *Principles*

*of the English Law of Contract* (London, 1889), 13; L. Hammon, *General Principles of the Law of Contract* (St. Paul, Minn., 1912), 38.

**116.** A.W.B. Simpson, “Innovation in 19th Century Contract Law,” *Law Quarterly Review* 91 (1975), 247 at 266.

**117.** In the United States, this step was taken in Massachusetts in 1851 by Chief Justice Shaw. *Brown v. Kendall*, 60 Mass. 292 (1850). In England, it was not taken until 1891. *Stanley v. Powell*, 1 Q.B. 86 (1891).

**118.** Sir Frederick Pollock, *First Book of Jurisprudence*, 172–3.

born hasty and awkward . . . his slips are no less troublesome to his neighbors than if they sprang from guilty neglect.”<sup>119</sup>

### 3. Since the Nineteenth Century

#### a. The Revolt against Positivism and Conceptualism

Since the nineteenth and early twentieth centuries, jurists in both civil law and common law systems have turned against positivism and conceptualism.

The mistake of “the traditional method,” according to the French jurist François Géný, is the idea “that the whole positive legal system is enclosed in a number of logical categories which are essentially predetermined, basically immutable, governed by inflexible dogmas, and therefore not susceptible of adjustment to the varied and changing exigencies of life.”<sup>120</sup> To maintain that the law should consist of categories whose “consequences should be deduced by logically necessary reasoning, could not be justified unless law were an exact science, such as mathematics . . .”<sup>121</sup> Rudolf von Ihering wrote a satire in which he visited the heaven of the jurists, which contained concepts so rarefied that they could never exist in our world, and devices for exploring them such as a hair-splitting machine. As Matthias Reimann observed, Holmes’ position was like that of Ihering.<sup>122</sup> Holmes denied that legal questions can be “settled deductively, or once for all.”<sup>123</sup> He criticized those who think “that the only force in the development of law is logic,” “that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct.”<sup>124</sup>

To claim that the law could be interpreted by formal logic was to ignore the purposes that rules serve. “Ihering invincibly demonstrated,” Géný said, that “legal rules and the solutions they provide are essentially determined by the practical purpose and the social goal of the institutions. Here is their source, and, one may say, here also is their logic.”<sup>125</sup> “Purpose,” Ihering maintained, “is the creator of the entire law: that there is no legal rule which does not owe its origin to a purpose, *i.e.*, to a practical motive.”<sup>126</sup> Similarly, according to Holmes, “every rule [the law] contains is [to be] referred articulately and definitely to an end which it subserves and . . . the grounds for desiring that end are [to be] stated or are ready to be stated in words.”<sup>127</sup>

The revolt against positivism raised questions that have never been put to rest among jurists. If the law is not deduced logically from authoritative sources such as civil codes or common law cases, how do judges decide cases?

**119.** Oliver Wendell Holmes, Jr., *The Common Law* (1881), 108.

**120.** François Géný, *Methode d'interpretation et sources en droit privé positif* (Paris, 1899), no. 62.

**121.** Géný, *Methode*, no. 64.

**122.** Mathias W. Reimann, “Holmes’s Common Law and German Legal Science,” in *The Legacy of Oliver Wendell Holmes*,

Jr. 72, 106 (Robert W. Gordon, ed., 1992), 101–3.

**123.** Oliver Wendell Holmes, Jr., “The Path of the Law,” in *Collected Legal Papers* (1920), 167 at 182.

**124.** Holmes, *Path*, 180.

**125.** Géný, *Methode*, no. 68.

**126.** Rudolph von Ihering, *Der Zweck im Recht* (Leipzig, 1884), liv.

**127.** Holmes, *Path*, 186.



If the law is to be understood in terms of purposes, what purposes does the law serve and how are their implications to be determined?

Accompanying the revolt against positivism was a revolt against conceptualism. It became clear that despite the nineteenth century jurists' claim to have produced coherent theories, even the law of contract, tort, and property of their own time could not be explained by the concepts on which these theories were built. As in the case of positivism, however, no generally accepted alternative has emerged to take its place. There is no generally accepted theory of private law. As Grant Gilmore said, speaking of contract law, the systems have come unstuck, and we see, at present, no way of sticking them back together.<sup>128</sup> We will see how, in resolving cases on property, tort, and contract law, courts in both civil and common law systems have reached results that the nineteenth century theories could not explain, and how they have done so without any new generally accepted theory to guide them.

## b. The Emergence of Comparative Law

Underlying the revolt against both positivism and conceptualism was the need to explain law in terms of the purposes that it serves. This quest for the purposes that underlie formal rules has inspired the leading approach to comparative law: functionalism. Often, when one compares different legal systems, one can see that courts arrive at similar results even though they are interpreting different authoritative sources of law and even when these sources contain different rules. One then suspects that their decisions are better understood as responses to common problems rather than as inferences from formal rules. What then seems to matter to the judges is not the authoritative texts or the formal rules but the purposes that the law serves.

The functionalist approach to comparative law attempts to identify such common purposes. For Konrad Zweigert and Hein Kötz, authors of the best known treatise on comparative law, "[t]he basic method of all comparative law is that of functionality."<sup>129</sup> According to Zweigert, "the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results."<sup>130</sup> If a scholar finds no functional equivalent of a rule in a foreign legal system, he should "check again whether the terms in which he posed the original question were indeed purely functional, and whether he has spread the net of his researches quite far enough."<sup>131</sup>

**128.** Grant Gilmore, *The Death of Contract* (Columbus, OH, 1974), 102.

**129.** Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung aus dem Gebiete des Privatrechts* (3rd edn., Tübingen, 1996), trans. Tony Weir, *Introduction to Comparative Law* (3rd edn., Oxford, 1998), 4.

**130.** Zweigert and Kötz, *Introduction*, 35.

**131.** Zweigert and Kötz, *Introduction*, 40, although Zweigert also noted that sometimes "the need to which institution X responds is met in foreign law by results produced by heterogeneous techniques which are impossible to compare with our institution X, or, again, quite simply, by custom." Konrad Zweigert, "Méthodologie du droit comparé," in *Mélanges offerts à Jacques Maury* (Paris, 1960), 579 at 590.

In examining the private law of civil law and common law systems, we will often see courts deviating from the texts of civil codes or from precedent to solve such problems. Sometimes they will reach similar results. Sometimes they will reach different results because there are different ways in which the same problem may be solved, each with advantages and disadvantages of its own.

By itself, however, a functionalist approach to comparative law is incomplete. Sometimes, although a problem may be the same, the values prevalent in a culture explain why a legal system adopts one approach rather than another. An example, as we will see, is what to do when the protection of freedom of speech conflicts with the protection of personal dignity or privacy. American law typically will protect freedom of speech and French and German law typically protect privacy. We will see differences between Western and Chinese law that are due to differences in which values are preferred. A cultural approach to comparative law is not in conflict with the functional approach. Both of them are concerned with what problem the law wishes to solve. The cultural approach emphasizes, quite rightly, that sometimes there is neither one right solution nor can one explain differences in the law as though there were a value neutral way to weigh the advantages and disadvantages of one solution against another. There are preferences among values, and it is shared preferences that enable us to speak of a culture.

Yet another approach is historical. There are some differences between legal systems that can only be explained by what is sometimes called “path dependence.” Legal systems may end up at different points because they started at different points, even though, along the way, they pursued similar purposes and shared similar values. An historical account does not conflict with a functional or cultural account of the differences. An historical account explains the development of legal systems in terms of purposes and value. It recognizes, however, that often one cannot understand the differences in legal systems today without looking backward to where they have been. That is one reason that this book starts with a look backward.

## **B. CHINA**

### **1. Law in Imperial China**

Perhaps the longest living civilization and the country with oldest continuous history in the world, China has developed a distinct legal tradition that differs from the West. There was no clear separation of powers between different branches of government. In principle, and, for much of its history, in practice, China was ruled by an emperor. In principle, though often not in practice, he could not exercise unbridled discretion. He ruled through officials who were supposed to counsel him and if need be oppose him. His legitimacy was thought to depend on the mandate of heaven (天命) which he could lose if he acted unjustly.

Another difference is that law, even private law, was primarily concerned with punishment of those who violated social norms. It was less concerned with defining these norms than determining the appropriate degree of punishment for violating them.

### a. Law versus *Li*

Two leading schools of philosophy differed over the role of law: the legalist school and the Confucian school. The legalist school, developed by Lord Shang and Han Feizi, saw an inherent value in the consistency, uniformity, and harshness of the application of law. Reward and punishment should be implemented strictly in accordance with the law without taking any moral considerations into account.<sup>1</sup> It was popular during the Warring States period (476–221 BC), and prevalent during the first short-lived dynasty to unite China: the Qin (221–206 BC).

The school of Confucianism emphasized the teaching of moral values and downplayed the importance of law. The ultimate end of the society is to nurture and educate its citizens to behave freely and voluntarily in accordance with *li*, (礼), the conduct appropriate in recurring social relationships, often translated as “propriety.” If they were to do so, law would not be needed. Therefore, law was relegated to penal codes. Confucianism was first accepted as the official philosophy by Emperor Wu (141–87 BC), the fourth emperor of the Han Dynasty (206–220 AD), and by many dynasties thereafter. It provided the moral standards that were supposed to prevent the emperor from exercising unbridled discretion.

Whether one looks to the penal codes or the teachings of Confucianism, clear rules and principles of contracts and property were nowhere to be found. Rules of tort law were subsumed under the law of punishment.<sup>2</sup>

*Li* was a body of rules regulating conduct, which emphasized morality as the foundation of society<sup>3</sup> and imposed obligations among citizens according to their social status.<sup>4</sup> The content of *li* characteristically depended on a person's status in his family, in his clan, in the neighborhood, in the official hierarchy, and in the state.<sup>5</sup> The position a person possessed depended on his age, sex, career, family position, and employment. The differences in status created relationships between people, and the society was structured on the basis of such relationships. Both legalism and Confucianism agree that a well-ordered society consists of the relationships of three cardinal guides (三纲).<sup>6</sup> In such relationships, ruler guides

1. Geoffrey MacCormack, *The Spirit of Traditional Chinese Law* (Athens, GA, 1996), 4.

2. See Zeng Xianyi, *The Legal History of China [Zhongguo Fazhi Shi]* (Peking, 2005), 1. Some Western scholars argued that the Chinese legal tradition can only be traced back to the Shang dynasty (seventeenth century BC – eleventh century BC). See *ibid.* 2.

3. See Daniel C.K. Chow, *The Legal System of People's Republic of China* (Eagan, MN, 2009), 40.

4. See Jianfu Chen, *Chinese Law: Context and Transformation* (Leiden, 2008), 12.

5. See Comments of Zuo eighteenth year of Zhuanggong [王命诸侯，名位不同，礼亦异数《左传 庄公十八年》].

6. See Han Fei Zi, *Royal and Filial [忠孝]*; see also Tung Chung-shu [Dong Zhongshu] *Luxuriant Dew of the Spring and Autumn Annals [春秋繁露]*.

ministers and subjects; father guides son; and husband guides wife. These are unequal relationships entailing mutual but different obligations.

The subjects/ ministers were to be loyal to the ruler, rulers were to nourish his subjects and respect and listen to their remonstrance. The son was to be filial, but the father was to love and protect him. The wife to be submissive and obedient, and the husband was to respect her position as wife.<sup>7</sup>

According to Confucius, a wise and noble man (*junzi*) should be aware of such a natural order and hierarchy rather than disturb the balanced harmony of the world. People are expected to follow the “*li*” freely and voluntarily by reason of their education. Ideally, law could be replaced by the proper teaching of morality and Confucianism.<sup>8</sup> Law and punishment would not be needed if everyone in the society were properly educated.<sup>9</sup> Confucius refused to punish or kill people who were not.<sup>10</sup> The next generation of Confucian philosophers Xun Zi (or Hsun Tzu) and Tung Chung-shu held similar views that when education is proper, every citizen will obey the law and no one would be punished.<sup>11</sup>

Confucianism recognized the differences between noble and humble and the dependence of social propriety (*li*) on a person’s status (“When status is different, *li* is different accordingly”).<sup>12</sup> Law functioned as a regulatory tool applicable mostly to “barbarian” people,<sup>13</sup> and physical punishments became available only when *li* was broken and conscience failed. The old Chinese saying “Chu Li Ru Xing” (出礼入刑) means “outside the *li* are punishments.”<sup>14</sup>

Other than regulating conduct outside the jurisdiction of law, *li* also modified the rigidity of written law with flexibility and exceptions. *Li* was regarded as a source of authority in the court of law.

Starting in Han Dynasty, in cases in which there was no applicable law in the statutes, Confucian classics were cited as authority in determining the guilt and the appropriate degree of punishment.<sup>15</sup>

## b. Distributive Justice versus Commutative Justice

In the West, scholars had comparatively little to say about what Aristotle called distributive justice, even the members of the natural law schools who drew heavily on Aristotle. As we have seen, they had a great deal to say about commutative justice. Roman law was almost exclusively

7. See MacCormack, *Spirit of Traditional Chinese Law*, 8.

8. See *ibid.* Confucius advocated the use of good morals to change people [*Yi De Hua Ren*].

9. See Ch’ü T’ung-tsu, *Law and Society in Traditional China* (Buffalo, NY, 1961), 249–50.

10. *Ibid.*

11. See *ibid.* 250.

12. Zuo Qiu Ming [左丘明], *Zuo Zhuan* [*Zuo’s Commentaries*] eighteenth Year of Zhuan Gong.

13. See Ch’ü, *Law and Society*, 250.

14. See *The Book of Han Dynasty*, “Biography of Chen Chong” [汉书 陈宠传].

15. See Zeng, *Legal History of China*, 117. One famous principle in determining the guilt by Confucius classics is the “principle of *Chun Qiu*.” *Chun Qiu* is a Confucianism classic.

concerned with the rights and duties of one citizen to another. As we have seen, the late scholastics explained as much of Roman law as they could by drawing on Aristotle's discussion of private property and his distinction between commutative justice in voluntary and involuntary transactions between citizens.

In China, as we have seen, law was concerned, not with identifying the rights and duties of individuals, but with punishments and their appropriateness to the offense committed. Confucianism discouraged litigation between private persons. One of the most important Confucian principles did concern how each person should treat others. Confucius said, "What you do not want done to yourself, do not do to others."<sup>16</sup> Mencius, the most influential Confucian teacher aside from Confucius himself, called this the principle of *shu* or "reciprocity."<sup>17</sup> But Confucian scholars did not try to work out in detail the implications of this principle. Consequently, they had little to say about what Aristotle called commutative justice.<sup>18</sup> Moreover, Confucianism discouraged litigation between private persons.

In contrast, Confucian scholars had much to say about what Aristotle called distributive justice.<sup>19</sup> They regarded society in the way Aristotle said is to be expected in an aristocracy. It is a hierarchical order in which the good and wise should receive in proportion to their merit. When one becomes a person of great virtue through self-cultivation, he should be awarded prestigious social status and appropriate property status. One of the Confucian Classics, *the Doctrine of the Mean*, provides that: "a great mind (or a mind with great virtue) shall get the status that he deserves, the wage that he deserves, the fame that he deserves, the longevity that he deserves."<sup>20</sup> Nevertheless, each person ought to receive a share that would enable him to fulfill his responsibilities and not tempt him to steal simply in order to live.

Mencius described what the government should do to ensure that each person had a fair share. It should "make the taxes . . . light, so the people may be made rich."<sup>21</sup> Ideally, the amount paid in taxes would be about a tenth.<sup>22</sup>

To limit taxes and to ensure that farmers had an adequate amount of land to farm, Mencius proposed an ideal program, the "nine squares" system, which few Chinese governments ever tried to implement. Parcels of land would be divided into nine squares, like a drawing for tic-tac-toe. One family would farm each of the eight squares. The ninth would be cultivated in common and the produce paid as taxes.

16. *Analects* 15.24.

17. *Mencius* 7A4.3.

18. See generally Deng Feng, *Corrective Justice in the Confucian Legal Tradition: A Non-existent Concept*, working paper at Harvard-Yenching's Confucianism Workshop in Cambridge, [www.lawschool.cornell.edu/international/clarke\\_program/conferences/upload/dengfeng.pdf](http://www.lawschool.cornell.edu/international/clarke_program/conferences/upload/dengfeng.pdf) (accessed

August 15, 2019; the link is no longer available).

19. *Ibid.* 30. Maintaining the system or big principles should be at costs of tolerating "minor conflicts or loss" in the enforcement of law.

20. See *ibid.* 18.

21. *Mencius* 7A23.1. See *ibid.* 1A5.3.

22. *Mencius* 3A3.6–7.

A square li covers nine squares of land, which nine squares contain nine hundred mu. The central square is the public field, and eight families, each having its private hundred mu, cultivate in common the public field. And not till the public work is finished, may they presume to attend to their private affairs.<sup>23</sup>

The program required a periodic redivision of land to make sure each family was provided for. The redivision had to be entrusted to officials. Mencius himself noted the danger of corruption.

If the boundaries be not defined correctly, the division of the land into squares will not be equal, and the produce available for benefits will not be evenly distributed. On this account, oppressive rulers and impure ministers are sure to slight this defining of the boundaries.<sup>24</sup>

Mencius was asked whether it would not be better if only a twentieth of the produce were collected in taxes. He answered that it would undermine the system in which a higher place was accorded to some than to others and the corresponding advantages. The principality of Mo had such a tax rate. Consequently, in Mo:

There are no fortified cities, no great houses, no ancestral temples, no ceremonies of sacrifice; there are no princes requiring coins, silks, banquets, no hundred officers with their subordinates. On that account a tax of one-twentieth is sufficient there.

But now we live in the Middle Kingdom. To eliminate proper relationships among men and have no *junzi*; how could that be acceptable?

With but few potters a kingdom cannot subsist; – how much less can it subsist without *chün tzu*?<sup>25</sup>

Each family was to have an adequate living, but those who held a higher rank were to receive proportionately more. In the Chou dynasty, which Mencius idealized, he claimed that the empire had been divided into states of varying sizes. The amount a person received depended on the size of the state and his rank within it. For example:

In a great State, where the territory was a hundred li square, the ruler had ten times as much income as his chief ministers; a chief minister four times as much as a great officer; a great officer twice as much as a scholar of the first class; a scholar of the first class twice as much as one of the middle; a scholar of the middle class twice as much as one of the lowest; the scholars of the lowest class, and such of the common people as were employed about the government offices, had for their emolument as much as was equal to what they would have made by tilling the fields.<sup>26</sup>

Kings, officials, and scholars were more worthy, and so they should receive more. Yet they did not receive so much more as to shock even

23. Mencius 3A3.19.

24. Mencius 3A3.13.

25. Mencius 6B10.6.

26. Mencius 5B2.6.



a member of our supposedly more egalitarian society. For purposes of comparison: the average family income in America is just short of \$60,000, and that of course is the median, not the bottom. If we imagine that amount to correspond to the earnings of Mencius' ordinary farmer, then, in the society he is describing, a scholar of the lowest rank would receive the same amount. A scholar of the next rank would receive \$120,000, which is the salary of a curator at a leading art museum, and somewhat below that of a musician playing with a prominent orchestra or the average university professor or state governor, and somewhat above that of the average journalist for the *New York Times*. A scholar of the first class would receive \$240,000, which is approximately the salary of the conductor of a prominent orchestra, a leading scholar at a major university, a mid-level editor of the *New York Times*, a well-known columnist, or a Supreme Court Justice. The great officers would receive \$580,000, the salary of the president at a prominent university or the director of a leading museum, and nearly one and a half times that of the President of the United States. The few richest men, the chief ministers, would receive \$2,240,000, a level reached by only the highest paid university presidents and some news anchors, a few of whom receive several times that amount. It is an unequal division of wealth but not so different than our own, so far as these occupations are concerned, although, by comparison, we grossly underpay those in government.

We have been considering, however, only jobs in education, government, art, and journalism. Top jobs in business and law pay more. \$120,000 is below the starting salary for someone with an MBA from a top school or a JD joining a top law firm. \$2,240,000 is half the compensation of a partner at a leading law firm, and one-fifth that of a CEO at a major company.

### **c. The Responsibility of the Family versus that of the Individual**

Monetary damage is a universal remedy for torts. However, what would happen in a society where the tortfeasor does not own property on his own? In imperial China, property was owned by the household and managed by the head of the household. The parental authority over the child's property can be summarized as prohibitions against "bie ji yi cai" (别籍异财) – establishing a separate household and alienating family property.<sup>27</sup>

Chinese traditional law subordinated individual rights and interests to those of the family. Accordingly, family members bore legal responsibilities jointly and the head of household controls the personal and property rights of the members within the household on behalf of the family.

The concept of family was the fundamental concept in Confucianism and the concept of state was just an extension of that of family. "Individuals were no more than members of a family or a social group; there was little significance in their separate existence, least of all the appreciation of

27. See for example, art. 155 of the Tang Code [诸祖父母、父母在而子孙别籍异财者, 徒三年]; see also art. 87 of the Great Qing Code.

liberty and individual rights.”<sup>28</sup> As a result, the head of household, usually the husband, possessed the absolute parental authority over children’s property and civil liberty. Thus, children had virtually no rights before their elders and a subject could assert no rights against the emperor. Throughout Chinese history, children regardless of age were prohibited from being non-filial or disobedient to their parents and grandparents, alienating the property out of the household, or having their own property, getting married without both parents’ approval and a marriage broker’s official set up.<sup>29</sup>

#### d. A Law of Punishments

As mentioned earlier, traditional Chinese law was concerned with punishments. The courts followed an elaborate procedural law which was aimed at determining whether the accused was innocent or guilty. It included the examination of witnesses and a series of appeals. Like Western procedure before modern times, it also allowed the use of torture. The substantive law was concerned with determining the appropriate degree of punishment for the crime of which the accused was convicted.

These features were in place before Confucian ideas exercised any influence. They date back to the kingdom of Qin which unified China by conquest. The rulers of the Qin were notoriously anti-Confucian. As mentioned earlier, they were influenced by a philosophy called “legalism” (*fa jia*) which deprecated traditional morality and taught that the sole goal of government was to strengthen the state and its ruler.

Some modern scholars have called the legalist philosophy Machiavellian or totalitarian at least in spirit. Yet the objectives of Qin law were not those one would expect of a Machiavellian or totalitarian regime. Totalitarian regimes have not cared greatly about the actual guilt or innocence of those under suspicion or about the appropriate degree of punishment. Nor did Machiavelli.

What we know about Qin law was written on strips of bamboo excavated in 1975 from the tomb of a third-century official who had his law book buried with him. Their laws were the basis of a code, or collection of laws, promulgated in the Han dynasty almost immediately after the overthrow of the Qin. According to the dynastic history of the Han, in about 200 BC, “Hsaio Ho [Xiao He] gathered together the laws of the Qin . . . choosing those which were suitable for those times . . .”<sup>30</sup> As mentioned earlier, Confucius’ teachings were adopted as official state doctrine under Emperor Wu, a process in which the emperor’s advisor Tung Chung-shu (179–104 BC), played a key role.<sup>31</sup> Tung supplemented the Code with

28. See Chen, *supra* note 4, at 12.

29. See Paul G. von Mollendorff, *The Family Law of the Chinese* (Shanghai, 1896), 42.

30. *Han shu* 23.12a, quoted in A.F.P. Hulsewé, *Remnants of Han Law* (Leiden, 1955), 26.

31. Wing Tsit-chun, *A Sourcebook in Chinese Philosophy* (Princeton, 1963), 271.



a collection of 232 cases based on the Confucian classic, the *Spring and Autumn Annals*, the *Ch'un ch'iu chüeh-yü* (春秋决狱).

Little is known about Han law. Only fragments survive. After studying them intensively, Hulsewé concluded that "Han law is the outcome of two streams of thought." One was "very matter-of-fact . . . practical and political, with *raison d'état* as its primary motive." It was based on "administrative and legal rules of the [Qin] empire, . . . rules [which] had the very practical purpose of maintaining the stability of government and of increasing its power by means of detailed regulations affecting the behavior of its subjects."<sup>32</sup> The other was "Confucian," but of the sort Hulsewé called "imperial Confucianism," which incorporated cosmological ideas about the order of the universe espoused by Tung.<sup>33</sup>

After the fall of the Han, China was divided into three kingdoms. In one of them Wei, the king, ordered two Confucians to revise the Han Code. He promulgated their new code, the *Xin Lü* or *Wei Lü*, which has been lost. It reduced the severity of punishments. It also added a section that survived into later codes which we will discuss later. It was a Confucian innovation called the "Eight Deliberations," which described the circumstances in which the normal punishment for an offence should be reduced.<sup>34</sup>

A further step toward the "Confucianization of the law" (Hulsewé's expression) was taken in the Northern Wei dynasty (386–584) when the Emperor Xiao Wendi modified the punishments for certain crimes to reflect Confucian principles: for example, breaches of filial piety were punished more severely.<sup>35</sup>

A further step was the promulgation of the Kai-Huang Code (Kai Huang Lü) by the Emperor Yang Jian (Wendi or Wenti) when China was reunified under the short-lived Sui dynasty (581–618). That code further reduced the severity of punishments. It also added a section called the "Ten Abominations," which described the circumstances in which the normal punishment for an offence should be increased.

These developments culminated in the Tang Code, which became a model for all later codes. Its most celebrated version was promulgated in 653. Its text has survived. It served as a model in Japan and Korea. It was adopted with only minor changes by the Sung and revised by the last two Chinese dynasties, the Ming and Qing. As Brian McKnight noted, "[t]he penal laws of the Sung . . . are virtually identical in style and form with their predecessors and their successors."<sup>36</sup> Thirty to forty percent of the articles of Qing Code were borrowed unchanged from the Tang.<sup>37</sup>

The Tang Code, like the Han Code, combined two streams of thought. One went back to the Qin. The other was Confucian. We can see the

32. Hulsewé, *Remnants of Han Law*, 5.

33. Hulsewé, *Remnants of Han Law*, 5.

34. John W. Head and Yanping Wang, *Law Codes in Dynastic China A Synopsis of Chinese Legal History in the Thirty Centuries from Zhou to Qing* (Durham, NC, 2005), 109.

35. Head and Wang, *Law Codes in Dynastic China* 111–12.

36. Brian E. McKnight, "Patterns of Law and Patterns of Thought: Notes on the Specifications (shih) of Sung China," *Journal of the American Oriental Society* 102 (1982), 323 at 323.

37. Wallace Johnson, "Introduction," in *The Tang Civil Code 1* (Wallace Johnson, trans., Princeton, 1979), 9.

influence of Qin law by comparing the Tang Code with those remnants of Qin law that survive. We can see with Qin law, the “primary motive” was not, as Hulwesé said, “raison d’état” or even “maintaining the stability of government and . . . increasing its power,” although that is the purpose one would expect given the legalist philosophy to which the regime subscribed.

The Qin and Tang drafters and commentators on law put a lot of hard thought into determining when one person was more deserving of punishment than another. In the surviving fragments of Qin law and in the Tang Code, the fruit of this thought was presented in much the same way: as a description of cases, each with a conclusion as to the appropriate punishment. There is no systematic organization to these cases. There is no attempt to group them under principles which are arranged hierarchically under higher level principles. Principles are stated infrequently, and they are not presented as reasons why one offence deserved greater punishment than another. They are generalizations based on specific cases, and the results appropriate in these cases are worked out by comparison and analogy to others.

Yet the texts show, not the absence of legal reasoning, but a different kind of legal reasoning.

For example, in the texts concerning theft, the punishment deemed to be appropriate depends on the “illegitimate profit” made by the thief. The texts do not define “illegitimate profit” or explain how it is to be determined. They describe specific cases. They ask what is to be done if the object stolen by the accused was worth over 660 cash at the time of the theft but worth only 110 at the time of trial. The answer: the accused was to be punished for a theft of over 660.<sup>38</sup> Suppose the value was 110 at the time of the theft but 660 at the time of trial. Then the accused should suffer the lesser punishment, and officials who had punished him to a greater extent were themselves to be punished for doing so.<sup>39</sup> The Tang Code provided more generally: “All cases of assessing the value of illicit goods do so according to the value of the articles at the time and place of the offense in terms of the set price of the highest grade of silk.”<sup>40</sup> In particular: “Assessment of the value of such things as boats, grinding mills, warehouses, and wholesale stores is according to the rent at the time of the offense.”<sup>41</sup>

Whether punishment should depend on the value of what the thief actually stole or what he intended to steal was a more difficult question. Neither Qin law nor the Tang Code posed the question in general terms. They described how a thief was to be punished in particular cases, and their answers differed. Suppose someone stole a goat with a rope attached, and that the value of the goat warranted one punishment while the value of the goat and the rope combined warranted another more severe one. According to the Qin texts, he should receive the lesser punishment if his “attention was on the goat he stole, not the rope.”<sup>42</sup> Suppose “there is

38. Hulwesé, *Remnants of Qin Law*, D 27.

39. Hulwesé, *Remnants of Qin Law*, D 28.

40. *The Tang Code* (Wallace Johnson, trans., Princeton, 1979), art. 34.1

41. *Tang Code* art. 34.3.

42. Hulwesé, *Remnants of Qin Law*, D 24.

a robbery of a mare and her foal follows her.” According to the Tang Code, “the foal’s value is included in the punishment.”<sup>43</sup>

Since the punishment depended on the harm done by the perpetrator, when several perpetrators were responsible, the question arose how much of the harm to attribute to each. Suppose A and B steal 800 cash from C. According to the Qin texts, if they planned the crime together, each is to be punished as though he had stolen 800. But if A and B each went to rob C, and met for the first time just before the robbery, and each took 400 from C, A and B are to be punished as though each had stolen 400.<sup>44</sup> Suppose A, B, C, and D planned together to beat or wound someone. According to the Tang Code, the punishment of each person is based on the harm done by the heaviest blow struck. If the heaviest blow broke a limb, the one who struck that blow receives the punishment from breaking a limb, which is three years of penal servitude. For the original plotter, if he did not strike that blow, the punishment is one degree less: two-and-a-half years. For the others, it is two degrees less: two years.<sup>45</sup> But suppose they did not plot together. Then each person is liable for the harm that he did himself: the person who broke a limb is punished by three years of penal servitude, the one who broke a finger by one year; the one who beat him without causing a wound with forty blows with the light stick.<sup>46</sup>

Most of the texts deal with how the perpetrator of a crime is to be punished. A few deal with what the perpetrator owes the victim. Again, that question was addressed by describing particular cases. A robber must give back what he stole, but suppose “he sells what he had robbed, thereby buying other things?” If so, according to the Qin texts, “all are given back to the owner” of the stolen goods.<sup>47</sup> Suppose the robber stole the victim’s clothes, sold them for money, and used it to buy cloth. Can the owner claim both the cloth and the clothes? He can only claim the cloth.<sup>48</sup> According to the Tang Code, in “all cases . . . in which the illicit goods are still in existence, return them to the . . . owner.”<sup>49</sup> “If there has been an exchange for other goods . . . the illicit goods are still considered to be in existence.”<sup>50</sup> Suppose, however, “a robber takes another’s goods and articles through trade or loan and gets a profit?” The profit does not go to the original owner because “this is due to the efforts of the later possessor and not the original owner.”<sup>51</sup>

The texts do not state the principles at stake or explain why they should be applied to reach a certain result. Yet the texts show, not the absence of legal reasoning, but a different kind of legal reasoning, one that rests on seeing similarities without analyzing what they are or why they are important. Those who formulated the texts decided, after careful thought, the punishment appropriate to a particular offence by considering

43. *Tang Code Commentary* 300.2.

44. Hulsewé, *Remnants of Qin Law*, D 10. D 20.

45. *Tang Code Subcommentary* to art. 308.1.

46. *Tang Code Subcommentary* to art. 308.2.

47. Hulsewé, *Remnants of Qin Law*, D 20.

48. Hulsewé, *Remnants of Qin Law*,

D 20.

49. *Tang Code* art. 33.1a.

50. *Tang Code Commentary* to art.

33.1a.

51. *Tang Code Query & reply* to art.

33.1a.

those prescribed for others. The magistrate deciding a new case would carefully consider which texts described a case most like his own.

The objective of Qin law and the Tang Code was to punish each offence consistently with the punishment meted out for others. It was not, however, to provide rules for determining what conduct constituted an offence. As Langlois noted, “Chinese codes do not set forth the definition of criminality that they enforced.”<sup>52</sup>

For example, in both, many provisions deal with stealing property or cultivating land that is not your own. None directly address the question of when goods or land are deemed to be one person’s property rather than another’s or when if ever one person can use another’s property without committing theft.

The Tang Code provides that “in cases of taking and giving without consent, the illicit goods that have been extorted are all returned to the owner.”<sup>53</sup> “Taking and giving without consent refers to such crimes as threats [and] fraud . . .”<sup>54</sup> “All cases of obtaining . . . goods by fraud or cheating are punished as comparable to robbery.”<sup>55</sup> But what constitutes “fraud and cheating”? One is only told: “Fraud means cunning and deceit. Cheating means falsity and deception.”<sup>56</sup> Although other general provisions in the Tang Code are explained by describing specific cases, these provisions are not.

Under both Qin law and the Tang Code, when a person was wounded or killed, it mattered whether the perpetrator acted intentionally. According to the Qin texts, killing or wounding is to be punished more severely when the killer acted under premeditation or *tsei* (*zei*, 贼), which A.F.P. Hulsewé translated in various ways: “intentionally,”<sup>57</sup> “murderously,”<sup>58</sup> or “with murderous intent.”<sup>59</sup> The texts say only that killing or wounding a person *tsei* is different to killing him *tou* (鬪/斗杀), and that the latter happens typically when a fight breaks out spontaneously.<sup>60</sup> It is comparable to murder in the heat of passion. The Tang Code also distinguished between killing someone in an affray<sup>61</sup> and doing so intentionally (故意杀).<sup>62</sup> According to the Code, however, one who killed another in an affray might have acted intentionally<sup>63</sup> although we are not told when.

The Tang Code dealt with harm done negligently or accidentally in a few discrete and separate articles. If a husband kills or wounds his wife or she kills or wounds his concubine “by accident, there is no punishment because there is no evil intent.”<sup>64</sup> If a wife or concubine kills or wounds a husband “by accident” then “[a]ccidental killing or wounding reduces the

52. John D. Langlois, “Living Law’ in Sung and Yüan Jurisprudence,” *Harvard Journal of Asiatic Studies* 41 (1981), 180.

53. *Tang Code* art. 32.2.

54. *Tang Code* Subcommentary to art. 32.3.

55. *Tang Code* art. 373.

56. *Tang Code* Subcommentary to art. 373.

57. Hulsewé, *Remnants of Qin Law*, D 35.

58. Hulsewé, *Remnants of Qin Law*, D 60.

59. Hulsewé, *Remnants of Qin Law*, D 71.

60. Hulsewé, *Remnants of Qin Law*, D 71.

61. *Tang Code* art. 306.1a.

62. *Tang Code* art. 306b.

63. See *Tang Code* art. 306b, Subcommentary to art. 306.1a.

64. *Tang Code* Subcommentary to art. 325.4.

penalty by two degrees.”<sup>65</sup> “All cases of recklessly driving carts or racing horses through the streets and lanes of cities are or where there are groups of people without any reason are punished by fifty blows of the light stick.”<sup>66</sup> “All cases of shooting arrows at city walls, homes of officials or private persons, or highways are punished by sixty blows with the heavy stick.”<sup>67</sup> “All cases of setting a trap that throws a spear or of digging a pit are punished by one hundred blows with the heavy stick”<sup>68</sup> but “[i]t is permissible to set traps that throw spears and dig pits deep in the mountains and marshes” as long as a sign is posted.<sup>69</sup> Each of these articles provides that if someone is killed or wounded as a result, the punishment is one degree less than for wounding in an affray.<sup>70</sup> “All cases of accidentally starting a fire in a field or of burning a field at the wrong time of year are punished by fifty blows with the light stick.”<sup>71</sup> “All cases of doctors who fail to follow the correct prescription in compounding medicine or make a mistake in the label or the use of the needle so that a person is killed are punished by two and one-half years of penal servitude.”<sup>72</sup>

We can now better understand the traditional Chinese view that there was no need for the people to know the provisions of the law or to consult lawyers who knew them. In the Song dynasty, private persons were prohibited from printing or copying the Code or any other laws, although the prohibition was eventually abolished. According to Ichisada Miyazaki, “[t]he theory was that, if the people knew the law, they could devise ways to circumvent it. The people’s duty was simply to obey the doctrines of Confucianism.”<sup>73</sup> The object of the Code, however, was not to provide rules for determining what conduct would be deemed wrongful. Indeed, one of the offences in the Tang and later codes was “doing that which ought not to be done.” According to Article 450 of the Tang Code, “All cases of doing what ought not to be done are punished by forty blows with the light stick.” A subcommentary explained that “[i]f there is no provision in either the Code or the Statutes . . . and there is no text to which analogy can be made, then . . . the circumstances of the crime are weighed to decide a punishment. So this article was established with a view to supplementing omissions and deficiencies.”<sup>74</sup>

By consulting the Code, a person was unlikely to find loopholes in the definitions of what conduct could be punished. He could, however, calculate and minimize the risk of being severely punished. He could determine the largest amount he could steal without incurring a greater punishment, or whether he would be punished less if he stole secretly or by force or by fraud. Chinese lawmakers saw little point in informing wrongdoers how to get off more lightly. In the United States, where all laws must be made public, and *ex-post facto* laws are constitutionally prohibited, a criminal

65. *Tang Code* art. 326.1c and Subcommentary.

66. *Tang Code* art. 392.1a.

67. *Tang Code* art. 393.1a.

68. *Tang Code* art. 394.1a.

69. *Tang Code* art. 394.2a.

70. *Tang Code* arts. 392.1c, 393.1c, 394.1b.

71. *Tang Code* art. 430.1a.

72. *Tang Code* art. 395.1.

73. Ichisada Miyazaki, “The Administration of Justice during the Sung Dynasty,” in *Essays on China’s Legal Tradition* (Jerome Alan Cohen, R. Randle Edwards, and Fu-Mei Chang Chen, eds., Princeton, 1980), 56, at 58.

74. *Tang Code* Subcommentary to art. 450.

may still receive a higher punishment under a statute enacted after the crime that increased the punishment. He has no right to know in advance how much he will be punished.

He does have a right to know in advance what conduct is prohibited, and in the United States and in many other countries, that right is regarded as part of the rule of law. The traditional Chinese attitude toward the rule of law was different. The Chinese subject was not informed in advance of what sort of wrongdoing was subject to punishment. He was supposed to know without consulting the law whether he was behaving rightly or wrongly. But by the same token, in traditional China, unlike the United States, he was unlikely to be punished for breaking a law he had never heard of prohibiting seemingly innocent conduct, and to be told that his ignorance of that law was no excuse. According to the traditional Chinese view, to be treated fairly, a rule of law must prescribe a punishment so that the punishment is proportional to the wrong committed. Under the traditional English common law, all felonies were punishable by hanging. In the United States, punishment depends on a vague set of sentencing guidelines and the discretion of a parole board. It is not true that in traditional China, unlike the West, there was no rule of law. Both traditions rest on underlying ideas of fairness and the need for legal rules. But these ideas are different.

## 2. Law in Modern China

### a. The Early Twentieth Century

#### The Codification Process

The idea of Westernizing of Chinese law arose at the end of the Qing Dynasty (1644–1911). Immediately, the choice was made to adopt continental European civil law. Modernization of the law was deemed a last resort to save the Qing Dynasty, and at the same time forced by the foreign powers in order to “achieve maximum protection for their citizens and property interests in China; and to make optimum use for their own benefit.”<sup>75</sup> China had seen its neighbor Japan prosper by modernizing its legal system, modeling it on German law. Also, civil law was believed to be far more systematic and easier to navigate than common law. In 1901, China started drafting the first civil code of China – the Draft of Civil Code of Great Qing (*Da Qing Min Lv Cao An*) and also a set of modern statutes like those commonly seen in civil law countries such as Germany, France, and Japan.<sup>76</sup> The first three books of this code were General Principles, Law of Obligations (*obligatio*) and Law of

75. See Gene T. Hsiao, *The Foreign Trade of China: Policy, Law and Practice* (Berkeley, 1977), 4.

76. Other major statutes that had been drafted include Draft of Commercial Code of Great Qing [*Da Qing Shang Lv Cao An*], Draft of Transaction Law [*Jiao Yi Hang Lv*

*Cao An*], Draft of Law of Bankruptcy [*Po Chan Lv Cao An*], Draft of Insurance Rules [*Bao Xian Gui Ze*], Draft of Code of Civil Procedure [*Min Shi Su Song Lv Cao An*], Draft of Code of Criminal Procedure [*Xing Shi Su Song Lv Cao An*].



Rights (*iura in rem*) drafted by Japanese jurists because these laws were largely civil law concepts that have never appeared in Chinese history. China had its own scholars draft the last two books (Family and Successions) that were mainly based on Chinese customs.<sup>77</sup> However, the Qing Dynasty came to an end in 1911 before the civil code was officially enacted. Still, the draft civil code was soon applied as official law by the modern courts established by the Qing Dynasty's immediate successor, the Republic of China, before their own civil code was officially promulgated.

The Nationalist (Kuomintang) government of China promulgated the Civil Code of Republic of China in 1929. It was modeled on the German Civil Code and included five books: general principles, obligations, property, family, and successions. This civil code is still in use in Taiwan.

### **The Battle between the Customs, Imperial Law and the Newly Adopted Foreign Law**

Though all the official laws were Westernized, the effectiveness of this dramatic legal transplant in Chinese society remains controversial. It has been said that:

owing to their alien concepts and their highly technical vocabularies, borrowed mainly from German and Japanese, these codes were neither relevant to the realities of Chinese life nor comprehensible to laymen. In consequence, they [the codes] had little effect on Chinese society; for all practical purposes their only use was to persuade the foreign powers to abrogate their extra-territorial rights.<sup>78</sup>

On the other hand, with a class of "properly" Western-educated lawyers in place, the new laws and doctrines were understood and implemented by the judiciary, as we can see from the published court opinions in the next paragraphs, which contradicts the claim that the newly adopted foreign law was not practically relevant.

These conflicting observations may both have some truth. There must have been a fraction of society in the financial position to take advantage of the imported judicial system. Still more may be explained by the roles of customs and the previous imperial law.

Long before the enactment of the Civil Code of the Republic of China, the Supreme Court discussed the possible sources of law, and the degree of their authorities in civil cases in a case decided in the first few years of the Republic (1912):

Civil cases are decided first according to express provisions of law, in the absence of express provisions, then, according to customs, and, in the absence of customs, then according to legal principles.<sup>79</sup>

77. See Zeng, *Legal History of China* 7 at 264–5.

78. See Hsiao, *The Foreign Trade of China*, 5.

79. (1) 2nd yr. A.C. 64 (Quoting Joseph En-pao Wang (ed.), *Studies in Chinese*

*Government and Law Chinese supreme court decisions regarding General Principles of Civil Law, Obligations and Commercial Law*, 1 The Commission on Extra-Territoriality (Beijing, 1923)).

When it came to the application of the customs, the court held that “[i]f a party alleges certain customs and the court finds that they exist and are valid according to law, they shall be applied to the exclusion of ordinary principles.”<sup>80</sup>

The court explained:

the validity of a custom is of course based on immemorial usage and common acceptance, but the matter it concerns must also be one that has not been expressly provided for by law or the usage is at variance with the provisions of only a non-obligatory law. If however the usage coincides with the provisions of some law, such usage is nothing more or less than the observance of law and no custom can result therefrom.<sup>81</sup>

Also, the rules in determining the validity of the customs were summarized by the court as “four essentials”:

- (1) It must have been observed by people generally and immemorially;
- (2) it must have been repeatedly observed by people as law; (3) the matter it concerns must be one for which there is no express provision; and (4) it must not be contrary to public policy or interest.<sup>82</sup>

The Supreme Court therefore held that “[t]hough customs prevail where express provisions of law are wanting, they are not *ipso facto* binding.”<sup>83</sup>

Though the Qing, the last imperial dynasty, came to an end during the Xinhai Revolution in 1911, its laws in civil and commercial areas were still valid before the enactment of the Civil Code of 1929. In 1914, the Supreme Court confirmed that:

Until the Civil Code of the Republic is promulgated the “Law Present In Force” of the Qing Dynasty, except the penal part and those that are repugnant to the existing system of government, continues to be in force. Though it was called the Penal Code, its provisions relating to civil and commercial matters are numerous; it must not therefore merely on account of its appellation be taken to have been repealed.<sup>84</sup>

## **b. The Republic of China (1911–1949)**

As a structured and modern code, the Republic of China Civil Code represents the then state of the art codification technique that was supposedly to serve an economy that was based on private ownership and a free market.

In stark contrast with laws in the communist era, private ownership was taken for granted and protected by the Civil Code. Unlike in the contemporary Chinese law where land is exclusively owned by the state and village collectives, the Republic of China Code protected full ownership

80. (2) 4th yr. A.C. 2354 (quoting *ibid.*).

81. (7) 2nd yr. A.C. 3 (quoting *ibid.* 2).

82. (7) 2nd yr. A.C. 3 (quoting *ibid.* 2).

83. (9) 4th yr. A.C. 1276 (quoting *ibid.*).

84. (3) 3rd yr. A.C. 304 (quoting *ibid.* 1).



of both movable and immovable property. There are five sources giving rise to obligations, including contracts, torts, agency, management of affairs without mandate, and undue enrichment.

One of the most significant reforms was the independence of the legal personality and the recognition of the individual as the subject of rights and duties. In his introduction to the English translation of the Republic of China Civil Code, Foo Ping-sheung, the chairperson of the civil codification commission of the legislature (Li Fa Yuan) cited Sun Yat Sen, the founder of the Republic of China, to support the legislative transition from the familial to the individualistic.<sup>85</sup> According to Sun Yat Sen, for China to become “a real state in the modern sense of the world,” it was necessary to “substitute for the primitive notion of unity of clan or family, the notion of the population formed by these clans or families.”<sup>86</sup> Sun Yat Sen predicted “the harmonious future of humanity lies in the combination of individual and family with individual taking precedency over family.”<sup>87</sup> “The individual must seek his own gratification in the development of his own natural abilities as is most likely to contribute to the general welfare.”<sup>88</sup> Therefore, “to enable the citizens to make use of their personal abilities in the best interest of their country, it was imperative that the excessive grip of the old families ties over the individuals should be loosened.”<sup>89</sup> He also stressed the universal value of the individualism of law. In his opinion, “the views expressed on this subject (individualism) are not particular to the Kuomintang. They may be found in the political programs of all the advanced democratic parties of the world.”<sup>90</sup> Also, in his opinion, the Kuomintang Party sought to “secure a better and more equitable distribution of wealth among the individuals” through the Civil Code.<sup>91</sup>

Article 7 of the Constitution of the Republic of China provided that “[c]itizens of Republic of China, are equal before the law regardless of the sex, age, race, religion, social class, and their association with any particular political parties.” Also, the Civil Code provided that the legal capacity of a person begins from the moment of birth and terminates at the moment of death. Moreover, legal capacity cannot be waived by a person.<sup>92</sup>

### c. The People's Republic of China

#### i. Some Persistent Problems

Though the 1930 Civil Code was a modern and sophisticated one, it was based on private ownership and a capitalist market. When a pure socialism regime was established in 1949, the legitimacy of the Code disappeared. After the economic reform in the late 1970s, a state led capitalist economy reintroduced socialist market economy and, most importantly, private

85. See Foo Ping-Shueng, “Introduction,” to *Civil Code of Republic of China* (trans Ching-ling Hsia, 1930), xx.

86. Ibid. xxv.

87. Ibid.

88. Ibid.

89. Ibid. xxv.

90. Ibid.

91. Ibid. xxi.

92. See Civil Code of Republic of China arts. 6, 16 (1930).

ownership. Nevertheless, additional difficulties came into light in using private law to regulate the life of civilians. In fact, a Civil Code was just enacted in May 2020 and will become effective on January 1, 2021, seventy-three years after the abolishment of the Civil Code of the Republic of China. It is a Civil Code with innovative features unique to China. It only has 1,260 articles divided into seven books: the general provisions, property, contracts, personality, family law, succession, and torts. In a break with civilian traditions, the Chinese Civil Code breaks down the book on obligations into contracts and torts; it absorbs the law of unjust enrichment into the book on contract as quasi-contracts. Moreover, a book on the law of personality stands on its own, which includes an enumerated list of personality rights protected by Chinese law with a focus on privacy and data protection as an effort to keep Chinese civil law up to date to tackle the legal challenges posed by the advancement of technology. In my view, the delay did not reflect the lack of diligence on the part of legislature and legal scholars, but rather several rather severe problems that needed to be resolved before a coherent and functional civil code could be drafted.

First, as we have seen, according to the will theories developed in the West in the nineteenth century, a party was bound by what he willed and only what he willed. That theory was hard to reconcile with the idea that contracts should be fair – to use the language of Aristotle, that they should do commutative justice, and it created theoretical difficulties in explaining private law. When this theoretical foundation was borrowed in China, the problems were exacerbated especially when state ownership is concerned. Courts are often misled by will theories and refuse to examine whether a contractual transaction was in fact an effort to strip state assets. This problem might be exacerbated following a progressive structural change that significantly modernizes the Chinese private law adopted by the Chinese Civil Code. In the general provisions of the Code following the German tradition, the Code unified the voidability rules between contracts and civil juristic acts, which were previously in conflict, under one set of rules that deals with all civil juristic acts.<sup>93</sup> Moreover, the Code no longer treats state interest any differently from private interests and eliminates the power state has had to declare the nullity of a contract.<sup>94</sup>

Second, conflicting legal transplants need to be harmonized and clear rules established in order to minimize the danger of contradictions within the future Chinese Civil Code. For example, courts seem to be at odds as to whether recovery for pure economic loss is permitted by Chinese tort law. Article 2 of Chinese Tort Liability Law (TLL), like section 823 of the German Civil Code, clearly enumerates the rights protected and excludes rights that are not rights of person and property. As we will see, German courts have concluded that a plaintiff cannot recover for pure economic loss. Article 6, on the other hand, resembles articles 1240–1241 of the French Civil Code, which permit recovery so long as harm resulted.

<sup>93</sup>. See Chinese Civil Code, arts. 143–57.

<sup>94</sup>. See Contract Law of People's Republic of China (1999), art. 52-1; General Principles of Civil Law (1986), art. 58.

French courts have held that a plaintiff can recover for pure economic loss. The result is confusion and inconsistency in judicial decisions. It is my impression that most judges have not faced the question of whether there should be liability for pure economic loss. They either do not see why law should only protect rights of property and person or they consider economic rights part of property rights. Judges who do face the question are unsure whether the economic right is protected by law.

Following the enactment of the Civil Code, it looks like the French view has prevailed among the drafters as evidenced by the new Article 1165-1. The division in Tort Liability Law will end as of 2021 when Tort Liability Law is superseded by the Civil Code. However, this significant change has not been mentioned in either legislative or academic commentaries before the official passage of the Code. It was not even being debated among the academics. Therefore, it will be interesting to see how this barely noticed but fundamental change in Chinese tort law will have any impact in practice.

The Chinese Civil Code, for the first time, adopted a version of the common law doctrine of frustration of purpose which excuses performance but does not excuse liability for breach of contract.<sup>95</sup> This is an example of the tension between common law and civil law. In common law, one could always opt for damages in lieu of performance while in German law one can always demand performance. In common law, frustration of purpose excuses a party from bearing liability for breach of contract when the purpose of the contract cannot be fulfilled. Chinese law, as in German law, treats the right to demand performance as sacrosanct. To be excused from the performance requires exceptional circumstances such as when the performance becomes impossible, excessively expensive or when the obligee does not exercise his rights in due time. One can only terminate the contract when one of these circumstances led to non-fulfilment of the purpose of the contract and even that does not excuse the party from assuming liability for its breach. This approach is borrowed from the doctrine of frustration of purpose in common law. This hybrid marks a doctrinal innovation. Moreover, Chinese courts will have to reconcile the tension between frustration of purpose that is partially preconditioned on economic fairness of the performance and destruction of basis of transaction in Article 533, which replicates German Civil Code, section 313 and is entirely focused on the change in the cost of performance after entering into the contract.

Third, Western private law is based on the fundamental idea of justice in a dispute between private parties – as Aristotle would say, commutative justice – as distinct from the fairness of the distribution of wealth in the society – as Aristotle would say, distributive justice. Nevertheless, a concern for the distribution of wealth is supposed to be at the foundation of the Chinese legal system. Courts need clearer guidance as to how to reconcile such a direct conflict between the two. The prime example is a basis for liability in tort that is recognized in China but not in the West: what may be

95. See Chinese Civil Code, art. 580.

called “liability in equity.” According to the doctrine of liability in equity, once harm is done, the party that caused it is partially liable even though he was not at fault provided that he is in a financial position to pay. Whether to impose liability, however, rests with the discretion of Chinese judges. This rule is not easy to square with the traditional grounds for liability in the West or with the idea that private disputes concern only commutative justice.

## ii. The Socialist Experience

### The Rejection of Private Law

The Republic of China Civil Code and other relevant legislatures were abolished upon the founding of the People’s Republic of China in 1949. Massive nationalization of private ownership and the use of central planning to replace a private market took place in the 1950s. Since then, private ownership of means of production was eliminated. When private ownership was denied, it was hard to track the development of private law and many would argue that the first thirty years of Communist China was a lawless era in private law.

As private ownership lost its legitimacy, it is hard to justify the existence of property law and tort law. Nevertheless, contracts and contract law could still exist to regulate the contractual dealings between government agencies and state-owned enterprises (SOEs). Contracts were only allowed between government agencies and SOEs, and for the sole purpose of implementing the state economic policies and directives. Such activities were regulated by governmental regulations rather than statutes. All economic activities undertaken with the motive for making a profit were deemed illegal. As a result, the contracting process was heavily regulated and virtually little autonomy was left to the contracting parties. SOEs were instructed to enter a contract with an assigned counterpart, on terms stipulated by the state. On the other hand, they did not have an independent budget and were deprived of the autonomy to retain any profit. The logic was to reduce the SOE manager’s incentive to strip state assets.

### The Economic Logic in the Establishment of State-Owned Enterprises

Upon the founding of the communist regime in 1949, the government realized that the development of heavy industry was a priority for the national economy of China if it were to survive the economic embargo and military threats imposed by the West.<sup>96</sup> With a backward agrarian economic structure and a labor-abundant but capital-scarce economy, it was essential to be able to channel the limited capital available into heavy industry while suppressing the prices of products and other factors indispensable for the heavy industry, such as raw materials, labor, services, energy, and agricultural products.<sup>97</sup> Also, industrial residues from other industries needed to be channeled into the heavy industry.<sup>98</sup> Because

**96.** See Justin Yifu Lin, Zhou Li and Fang Cai, *Chinese State-Owned Enterprises Reform* (Hong Kong, 2001) 21.

**97.** See *ibid.* 20–8.

**98.** See *ibid.*

private investors would have more incentive to invest in the service industries where abundant labor can be used at bargain prices, it was economically logical for the government to nationalize heavy industry and establish state-owned enterprises to carry out state objectives regardless of financial profitability. Sectors outside heavy industry were nationalized to lower the cost of resources that heavy industry needed. Such resources were channeled into heavy industry at below market prices. Such an allocation of resources would not have resulted if these sectors were in the hands of private investors.<sup>99</sup>

It logically followed that, after the thorough nationalization, the private sector was eliminated and the state owned every single business. Only legal persons (state-owned enterprises, government agencies, and village collectives) were allowed to contract.<sup>100</sup> The free market was replaced by a pure supply system. When there was no market, and the sole purpose of industrial production was to carry out state economic plans, there was a natural incompatibility in the incentives to serve state objectives and those of the SOEs to run for profitability. In a competitive market, profitability is the most effective information indicator for evaluating the performance of a manager. It is a checks-and-balances mechanism that holds managers accountable for their performance. When a market does not exist, the owner of the SOEs – the state – has no equally effective indicator to evaluate the performance of SOE managers. Without a market, profit and loss no longer reflect managerial performance. In an economy with such serious price distortion as that of pre-reform China, price did not reflect the scarcity of resources. The profit level could be heavily influenced by state economic policies. Since SOE managers were unlikely to be held financially accountable in the exercise of managerial or contractual autonomy, SOE managers tended to reward themselves by retaining more profits and raising wages, which conflicted with the state agenda that called for rapid development of the heavy industry at the lowest cost. In addition, the rewards open to SOE managers as career bureaucrats had no clear relation to the potential losses the state might suffer from opportunistic deviation from state plans.

We can call this problem in China one of incentive incompatibility. The incentives of the managers as career bureaucrats are often incompatible with their incentives to manage their enterprise profitably. In contrast, in the West the problem on which corporate law theory concentrates can be called one of incentive divergence. The goal is to reduce the divergence

**99.** Heavy industry itself is capital intensive and the price to use limited capital in a poor country like China was extremely high. If a free and competitive market was available for private investors, there would have been a much lower incentive for the investors to channel their capital into the heavy industry. The threshold would have been much lower and the investment much more profitable in light industry rather than heavy industry. In 1957, profit and tax generated by the same

capital in light industry was 270 percent higher than that in heavy industry. In addition, if resources were allocated through a free market, it would have been too expensive to realize the rapid growth when the prices of capital and raw materials, labor, and energy were at their fair market prices. See *ibid.* 21–2.

**100.** See *The Tentative Rules on Industrial and Mining Products Ordering Contract* [关于工矿产品订货合同基本条款的暂行规定] art. 3 (1963).

between the incentives of the owners and the managers of wealth. The premise of the theory is that when one person exercises authority that affects another's wealth, interests may diverge. Business managers, as the agents of the investors, always have divergent interests from the investors. Such a divergence exists in any agency relation.<sup>101</sup> The smaller the share of ownership that the managers hold, the larger the divergence of interest becomes. For example, the manager will not have the same level of incentive to make an extra effort to increase the profit of the enterprises as the investors themselves would have if their own share of ownership is small and the increase of their own wealth is small compared to their extra efforts.<sup>102</sup>

In the Western free market and free enterprises system, such a divergence can be controlled in three ways.

- 1) There is the employment market: an unfaithful or indolent manager may be penalized by a lower salary, and a diligent one rewarded by a bonus for good performance. This is a function of incentive-compatible contracts that reward managers for good performance and penalize them for bad. The goal is to align the interests between managers and shareholders as closely as possible.
- 2) The threat of a sale of corporate control induces managers to perform well in order to keep their positions.
- 3) Competition in product markets helps to control agents' conduct, because a poorly managed firm cannot survive in competition with a well-managed firm.<sup>103</sup>

Nevertheless, these mechanisms reduce but cannot eliminate the divergence of incentives. Consequently, principles of fiduciary duty are used to supplement direct monitoring of managerial performance by investors. Managers are allowed to exercise managerial discretion, but will be held accountable for violation of fiduciary duty. Their conduct is subject to the business judgment rule. The rationale behind this rule is the recognition that investors' wealth would be lower if managers' decisions were routinely subjected to strict judicial review.<sup>104</sup>

In China, before the economic reform, SOE managers, if given the managerial and contractual autonomy permitted by the American business judgment rule, would have tended to maximize the profits of the enterprises or to appropriate for themselves part of the industrial surplus, neither of which was consistent with the state's objective to prioritize the heavy industry. Therefore, the purpose of SOEs for the state, as the sole investor in SOEs, was to implement its economic plans rather than to use the SOEs to maximize wealth. SOE managers were instructed to adhere strictly to economic directives and orders. Logically, it made sense that SOE managers should not be accountable for the profitability of the SOE. In fact, SOEs' business operations often resulted in heavy deficits. When

**101.** Frank H. Easterbrook and Daniel R. Fischel, *The Economic Structure of Corporate Law* (Cambridge, MA, 1991), 91.

**102.** See *ibid.*

**103.** See *ibid.*

**104.** See *ibid.*



the profit-motive was not permissible, managers tended to intercept the industrial surplus and to misappropriate state assets if any managerial autonomy was afforded to them. Such an incompatibility could not be cured by negotiating incentive-compatible contracts between the state and SOE managers through the employment market simply because managers had no ownership interest in SOEs. The direct result was that the incentives between the two were opposed. Again, there were no employment markets for corporate executives since all the managers were government employees at the same time. Also, SOE managers could be laterally transferred to other government positions. Finally, a poorly managed firm could still survive when there was no market available to push it out.

As contractual and managerial autonomy could not be justified, it was necessary for the state to supervise every aspect of the business operation to make sure the state economic plans and objectives received priority over the individual agenda of an enterprise itself. Before the economic reform, at the enterprise level, SOEs did not have production decision-making autonomy.<sup>105</sup> SOEs could not decide what to produce, their research and development direction, or how much they were going to produce.<sup>106</sup> In order to negate the incentive for profit maximization, SOEs did not have independent budgets and would not be held accountable for deficits. All the deficits had to be absorbed by the state and virtually all the profits were turned over to the state as well.<sup>107</sup> For the same reasons, SOEs could not set employee wages on their own. Moreover, autonomy in resource allocation was taken away from SOEs. When allocation of resources was not completed through the market and prices of the raw materials were artificially suppressed, prices no longer reflected the scarcity of the resources. If SOEs were allowed autonomy to decide what resources they needed and how much was needed, every SOE would have the incentive to acquire more resources at suppressed prices by increasing the cost of production.<sup>108</sup> As a result, each enterprise would submit a proposal to the material supply agency within the government describing the resources and materials needed to complete the mandatory plans assigned by the state. The government would deliver the materials, once the proposal was approved, based on the state economic plans.<sup>109</sup> The SOEs did not have the autonomy to select suppliers or compare the products.<sup>110</sup>

Consequently, instead of the decentralization of business decision-making in the West, in the pre-reform Chinese economy, the state had to give specific directives to individual enterprises on the types of products to be manufactured, the quantity, quality, and specifications of the products, the kind and quantity of the raw materials an enterprise received, the pricing and the buyer of the products, and the wages of labor and management. Any unauthorized reselling of products and sale of unauthorized products would result in the nullity of a contract, along with civil and criminal sanctions. Contract management was strictly carried out by

105. Lin et al., *supra* note 96, at 32.

106. See *ibid.*

107. See *ibid.* at 33.

108. See *ibid.*

109. See *ibid.* at 37–8.

110. See *ibid.* at 38.

various ministries, departments, and economic commissions at all levels of the government.

### The Theoretical Coherence of Socialist Law

Intellectual efforts had been made by socialist jurists to piece together coherent contract theories that would support the planned economy. According to the theorists, ownership of the means of production was exclusively in the hands of the state.<sup>111</sup> Even means of subsistence, the resources necessary for people's daily consumption, could not be traded on the market.<sup>112</sup> The only interest protected in contracting was the state's interest. The institution of contracts served as an important tool in ensuring the implementation of state plans.<sup>113</sup> Contracting connects the enterprises systematically and helps to clarify and determine the content of state plans.<sup>114</sup> Since no private interest was involved, all the contracting parties were simply executing orders from the state. Therefore, the contracting parties were to collaborate and supervise each other throughout the performance of contract to carry out the state's agenda. A party who defaulted was liable for penalties and damages. Any deviations from the plan would result in the illegality of the contract. The only overlap between the state and private sector lay in the uniformed procurement and supply where prices were set by the state.<sup>115</sup>

The 1958 *Civil Law Textbook* ("the *Treatise*"), presented a coherent socialist contract theory. In the *Treatise*, even though freedom of contract was criticized for its lack of legality, contractual autonomy was not entirely denied.<sup>116</sup> The *Treatise* proposed that the principle of voluntariness and reasonableness be the fundamental principle of contract law.<sup>117</sup> However, the *Treatise* stressed that contracts should be entered for the sole purpose of implementing state plans and where state and individual interests coincided.<sup>118</sup> According to the *Treatise*, "[c]ontracting should follow parties' voluntariness and its conclusion must be based upon the free declaration of wills, sufficient mutual negotiations, and the meeting of minds. Neither party is allowed to impose its will on the other by ordering the other party to accept its opinion or other illegal means through the conclusion of contract."<sup>119</sup>

111. The leading treatise at the time, known as the 1958 *Civil Law Textbook*, pronounced that the elimination of capitalist ownership was completed through public private joint venture and the petit private ownership of peasants and craftsmen were gradually eased out through their "voluntary participation in the rural cooperatives." As a result, private ownership of means of production had ceased to exist. See *Teaching and Research Section of the Central Political and Legal Cadres' School*, ed. [中央政法干部学校民法教研室] *Basic Issues of Chinese Civil Law* [中华人民共和国民法基本问题] [hereinafter, *The Treatise*] 26 (Beijing: Law Press, 1958).

112. The rationale was that private means of subsistence was protected but could not in any way abuse means of subsistence to harm public interest or exploit others. See *ibid.* at 129.

113. *Ibid.* at 26.

114. *Ibid.* at 27.

115. Liang Huixing, "On the Plan Principle and Principle of Freedom of Contract in Our Contracting System," 4 *Legal Studies* (1982), 44 [梁慧星 论我国合同法律制度的计划原则与合同自由原则 《法学研究》1982年第4期第44页].

116. See generally *Treatise*.

117. See *ibid.* 202.

118. *Ibid.*

119. *Ibid.* 203.



Furthermore, reasonableness requires that the content of a contract must be fair so that neither party's interest is harmed. Neither could the contract harm the public and social interest. The whole or part of a contract shall be annulled if the content of the contract was obviously unfair or unreasonable.<sup>120</sup>

The content of these two requirements resembles the Western view of freedom of contract and its limitations. Classical contract theory gave wills of the contracting parties binding force barring illegality and immorality or violation of public policies.<sup>121</sup> It was possible for devices such as *Wucher* in German law, *lésion* in French law, and unconscionability in common law to give relief for unfair prices. It was said in China that prices of commodities in the West were determined by Marx's law of value, which guided the circulation and production activities in the society.<sup>122</sup> However, in the view of the *Treatise*, the unavoidable phenomenon of price fluctuation in the West was used as a means by capitalists, the only class that owned means of production, to exploit toilers by engaging in opportunistic behavior. China, on the contrary, by establishing the socialist economy, limited the effectiveness of the law of value.<sup>123</sup> Through careful planning, the state supposedly would be able to set the prices of commodities differently from their value. Such differences were to be used consciously to "adjust the circulation of commodities" with the purpose of "improving the quality of toilers' material and cultural lives."<sup>124</sup>

However, the *Treatise* argued that the difference between principles of voluntariness and freedom of contract lies in that freedom of contract emphasized voluntariness while neglecting the requirement of legality.<sup>125</sup> The voluntariness principle, according to the *Treatise*, allows contracting parties to freely express their will provided but only within the scope permitted by law.<sup>126</sup> For example, in a sales contract, elements such as the object and the range of the prices must be prescribed by law.<sup>127</sup> Capitalist law was criticized as permitting unlimited autonomy in contracting, which allowed the owners of means of production unlimited exploitation of the toilers.<sup>128</sup> Allowing free contracting without setting the variety and price of commodities would result in monopoly, at which point contract terms would no longer be negotiated.<sup>129</sup> Toilers then only have the options of accepting the terms or refusing to contract. This meant allowing exploiters the freedom of exploitation without letting the toilers have the freedom not to be exploited.<sup>130</sup> Therefore, only in the communist regime, would toilers be free from exploitation. According to Mao Zedong, when bourgeois class had its freedom, there would be no freedom for the proletariat.<sup>131</sup> The *Treatise* concluded that the principle of voluntariness is

120. Ibid.

121. See Zweigert and Kötz, *Introduction*, 381.

122. See *Treatise* 217.

123. Ibid.

124. Ibid.

125. Ibid. 204.

126. Ibid.

127. Ibid.

128. Ibid.

129. Ibid. 204–5.

130. Ibid. 205.

131. 毛泽东 [Mao Zedong] 《关于正确处理人民内部矛盾问题》 [On How to Handle the Internal Conflicts among the Masses] (1937).

a unification of freedom and discipline where “proletarians enjoy a wide range of freedom but restrain themselves through socialist discipline.”<sup>132</sup>

Transactions between individuals in the shadow economy were deemed illegal but could not be regulated since law does not allow transactions between private parties. Outside the shadow economy, the only transactional relationships between the state and private parties were the procurement of products from the state and supplies of commodities to the individuals. In such circumstances, no competition between the state and private interests existed and the state did not have to play contradictory roles as a referee and a player at the same time, the roles it now plays in the post-reform economy. The issue of state interference with private interests by allowing SOEs to back out of a bad bargain with a private party did not arise. Also, absent private ownership and a market, courts did not have to face the theoretical question of whether observance of the external formalities of freedom of contract would suffice or whether they should review the substance of the contract. Courts would always be able to annul a contract where a state interest of any sort was jeopardized.

Therefore, theoretical coherence of socialist contract law was achieved regardless of its limitations in practice.<sup>133</sup>

### iii. The Reform

#### The Reintroduction of Private Law

At the end of the 1970s, in order to invigorate state-owned enterprises and improve the efficiency of the economy, incentives and competition were introduced. A private economy was permitted without privatizing state enterprises and SOEs were allowed to keep a small percentage of their profits. SOEs did become motivated to perform better but they were not deemed to be sufficiently motivated. Soon the state changed its policy by allowing individual contracts with SOEs and allowing them a bigger share of the pie. That proved ineffective as SOEs had informational advantages over the state and contracted opportunistically. In mid-1980, the state finally decided to allow all SOEs to retain all their profits and began to collect income tax. Step by step, SOEs became treated, by and large, as market players.

When SOEs became more profit-oriented and when they competed for profit with the private sector in a relatively free market, it soon became imperative to embrace private law in order to promote stability of the market transactions and provide the economy with further incentives.

In 1986, a legislation similar to a civil code with the title General Principles of Civil Law (“GPCL”) was adopted. It provided a framework of civil law in modern China, which presented basic rules of property law, contract law, tort law, and unjust enrichment in only 156 articles. The GPCL was accompanied by more systematic Supreme Court interpretations promulgated in 1988. The idea of protection of private ownership

132. *Treatise* 206.

133. The socialist contract theory does not have practical application to the shadow

economy or any contractual transactions that do not involve state or state-owned enterprises.

became accepted in the 1980s and became a sacred legal principle after the subsequent adoption of the Contract Law in 1999, the Property Law in 2007, and the Tort Liability Law in 2010. This development is supported by a 2004 constitutional amendment that recognized that “[citizen’s] lawful private ownership is inviolable.”

### Corporatization

In an economy where private ownership and competitive markets are the norm, it is easier to justify the freedom of contract since a reasonable person should be allowed to dispose of his property and to contract to determine his own fate and bear the negative consequences accordingly. On the other hand, in an economy where a market is absent, state ownership of means of production is exclusive, and the allocation of resources is centralized, as in pre-reform China, every SOE exercises their operational management rights by entering into contracts on behalf of the state. It was consistent with the socialist theories to deny freedom of contract in order to prevent opportunistic behavior by these SOE managers, the agents of the state. The socialist theories were by and large coherent. However, in the first decade of Chinese economic reform, both theories became inapplicable to China. There was a rapidly growing private economy outside the dominant state sector, and a dual track price system that allowed market prices to exist in parallel with the fixed prices in the planned economy. This new paradigm created theoretical issues that would fit in contract theories in neither traditional socialist economy nor the Western capitalist model.

At the beginning, profit retention and increased autonomy brought efficiency and proper incentives back to state sector. However, due to the continued absence of a competitive market, and the information asymmetry that comes with it, the reform failed to resolve the problem of managerial opportunism that the pre-reform system aimed to prevent. Ten years into the economic reform, the economic efficiency and profitability of SOEs stalled. Low profitability became common among SOEs. For example, the after tax profit of SOEs decreased from 6.6 percent in 1987 to 1.8 percent in 1994.<sup>134</sup> Increased bank loans were made available upon request to support the SOEs at the below market rates. However, the number of non-performing loans continued to accumulate when the efficiency of the SOEs stalled. Corporatization was introduced to accelerate the reform progress.

As part of the small-scale privatization effort, the rise of stock exchanges and equity exchanges allowed private investors to become the minority shareholders of large-scale SOEs. In addition, restructuring, as a popular device, was introduced to privatize inefficient small and medium enterprises. Both devices served to further privatize the Chinese economy. Nevertheless, in contrast to the former Soviet and East European models, no program allowed for the wholesale divestment of state enterprises program to be undertaken.<sup>135</sup> As a result, no massive asset stripping took place on a scale such as that in the Soviet Union.

134. See Lin et al., *supra* note 96, at 66. Dominant Privatization Model,” *Brook.*

135. See Lan Cao, “The Cat That Catches Mice: China’s Challenge to the *J. Int’l L.* 21 (1995), 97 at 106.

To facilitate the transformation of a planned economy to a market economy, the Economic Contract Law was amended in 1993. The Company Law of China was also adopted in the same year.<sup>136</sup> The amended Economic Contract Law added two types of family-owned sole proprietorships: peasant households and private-owned business households, as parties who are allowed to enter into economic contracts.<sup>137</sup> Also, in the amended article 7 of the ECL, violation of Communist Party economic policy was no longer a cause for nullifying a contract,<sup>138</sup> which signified the end of the planned economy. The newly enacted Company Law did not limit legal persons to SOEs and therefore opened the floodgate to allow privately owned enterprises to register as corporations and assume the status of legal persons.<sup>139</sup> In 1999, the Contract Law, a product of legal transplantation resembling the United Nations Convention on Contracts for International Sales of Goods (CISG), adopted freedom of contract as a basic principle.<sup>140</sup> Rules that one would expect in a major Western civil code are now in place to protect contractual autonomy and transactional safety. Parties now have the autonomy to decide whether to contract, with whom to contract, and on what terms. The doctrines of apparent authority, *ultra vires* activities, and voidability were introduced. Upon breach of contract, the aggrieved party can now choose the form of remedy between monetary damages and specific performance. Plans and policies, which were once dominant, no longer play an official role in contracting and the Contract Law statute.

Nevertheless, it is not the case that the statute is and shall be equally applied to all parties regardless of their ownership status. In the West, market competition and fiduciary duty hold managers accountable for their imprudent managerial performance. This is still hardly the case for Chinese SOEs. Even though reforms have been carried out to invigorate SOEs, the market is still not sufficiently competitive and fiduciary duty principles are ineffective in imposing managerial accountability. The fiduciary principle, as in the West, functions to protect the principal's reliance interest. In China, without such a market, prices can be suppressed for policy reasons. Since SOEs are also pursuing goals other than profit maximization, the usual market indicator, profitability, does not provide sufficient information to the state. As a result, non-profitable transactions could be carried out for policy considerations. On the one hand, a low price itself is not sufficient to prove an SOE manager's breach of fiduciary duty. On the other hand, it is impractical and unrealistically expensive for the state, as the sole shareholder or controlling shareholder, to monitor the contracting of individual enterprises. Additionally, the state's low sensitivity to profits

**136.** Before the promulgation of Company Law, there were two separate statutes dealing with state-owned enterprises and privately owned enterprises separately.

**137.** See Economic Contract Law, art. 2.

**138.** However, this does not mean SOEs have stopped following state economic policies closely.

**139.** 中华人民共和国公司法 [Company Law of the People's Republic of China], arts. 2 & 3.

**140.** See 中华人民共和国合同法 [Contract Law of People's Republic of China], art. 4.

compared to private investors makes the state a passive principal who is not actively pursuing its own financial interest.

The behavior of SOE managers, on the other hand, could not be controlled by an effective structure that makes the incentives of managers as career bureaucrats compatible with their incentives as directors of a business enterprise. As I described the problem in an earlier article:

Managers in state-owned enterprises are government employees more than businessmen and lack personal incentives and financial stakes in running the business. Managers receive salaries that are comparable to government employees with similar bureaucratic ranks, and directors and officers can be laterally transferred to other government agencies in the event the SOE goes bankrupt. Since these quasi state-officials are not nearly as motivated as private entrepreneurs, since they are not accountable to shareholders for their grossly negligent business decisions, when it comes to decide whether a contract should be nullified.<sup>141</sup>

In a true market economy, contractual autonomy should extend to SOEs as well. The state-owned enterprises are no longer established for the sole purpose of implementing state policies. Most of them are for-profit and operate under the leadership of their own management rather than government authorities. Therefore, SOEs are market participants whose interests should receive only as much protection and supervision as private parties receive. However, the state retains a supervisory power over the management through the authority of the State-owned Asset Supervision and Administration Commission<sup>142</sup> and various ministries and financial regulatory bodies. At the same time, policy induced burdens, soft budget constraints, and artificial entry barriers still exist. On one hand, they burden SOEs; on the other, they help them survive market competition.

In order to better monitor SOE performance, many statutes, administrative regulations and departmental rules have been enacted since the late 1980s designed to curb managerial opportunism in SOEs and to realign the disparity between their goals and those of the state. In order to curb the managerial opportunism and prevent asset stripping, several regulations have been put in place to require asset appraisal, and, in major transactions, state approval in contracts disposing of state assets.<sup>143</sup> The asset appraisal

**141.** Hao Jiang, "Enlarged State Power to Declare Nullity: The Hidden State Interest in the Chinese Contract Law," *J. Civ. L. Stud.* 7 (2014), 147 at 188.

**142.** SASAC was created in 2003 to exercise state's shareholder rights within the SOEs. SASAC has the authority to appoint the management personnel, supervise major management decision-making and the use of state-owned assets. See 国务院关于机构设置的通知 (国发(2008) 11号) [State Council's Notice on Agency Creation] (*Guo Fa* (2008) No. 11).

**143.** See, e.g., 中华人民共和国企业国有资产法 [State-owned Assets Law of the People's

Republic of China] adopted by the Standing Comm. Nat'l People's Cong., October 28, 2008, effective May 1, 2009; 企业国有资产监督管理暂行条例 [Provisional Methods on Supervision of State Assets Appraisal] promulgated by the State-Owned Assets Supervision and Administration Commission, May 27, 2003, effective 2005; 国有股东转让所持上市公司股份管理暂行办法 [The Provisional Methods on Supervision of Holder of State Shares' Transfer of State Shares] promulgated by the State-Owned Assets Supervision and Administration Commission, effective July 1, 2007, art. 7; 国有资产评估管理办法 [Rules on the

procedure might serve as an *ex ante* deterrent to asset-stripping. However, for *ex ante* deterrence to function, when a flaw in the asset appraisal process is later detected, an *ex post* standard must be established to determine whether asset stripping took place. Such a standard should review the substantive fairness of the transaction. When the contract price was not substantively fair, courts, at the request of the aggrieved SOE, should be empowered to annul the contract when no legitimate policy or business reasons for the low price can be established. However, Chinese courts have claimed that they are not in a position to review the alleged unlawfulness in the asset appraisal procedure even when evidence shows the procedure was violated.<sup>144</sup> Moreover, according to the court, violations in such procedures alone do not amount to asset stripping.<sup>145</sup>

On the other hand, the state has rewarded SOE managers by giving out bonuses for making profits and punished them by cutting salaries for operating the SOEs at a loss. These efforts are designed to preserve state assets, encourage a market economy, and also increase managerial efficiency. The two goals seem to contradict each other. The first limits the freedom of contract beyond what one would expect from the statutory and doctrinal interpretations, such as freedom to decide contract terms or to set prices, and the second increases managerial and contractual autonomy. According to Yifu Lin, such reform efforts could not be successful and complete because of the lack of a fair and competitive market.<sup>146</sup> Despite reform, SOEs continue to carry out non-profit driven goals to serve the state's policy and strategic interests. In order for SOEs to survive, the state must provide direct and indirect subsidies and soft budget constraints. Accordingly, profit level in a non-competitive market does not reflect the managerial performance. Consequently, as Joseph Stiglitz pointed out, without functioning market competition, a rational incentive structure cannot be formed.<sup>147</sup> The absence of competitive market further warrants the deprivation of full enterprise autonomy to avoid asset stripping. Due to the economic reform, the doctrinal coherence of socialist contract theory was lost. As a result, courts are often at a loss and decisions may vary from respecting the freedom of contract to reviewing the substantive fairness of the transaction in order to prevent asset stripping.

### Theoretical Incoherence

Though massive privatization of SOEs never took place in China as in central and eastern Europe, privatization of small and medium SOEs and market capitalization of the non-controlling interest of the major SOEs allow private sector actors to acquire state assets through contractual transactions. Through these transactions, freedom of contract has been abused by SOE managers in pursuing personal agendas that are often

Appraisal and Management of State Assets] promulgated by the State Council of China, Nov. 16, 1991, art. 3.

**144.** See 216 白商初字第231号 [(2013) Bai Shang Chu Zi No. 231].

**145.** See *ibid.*

**146.** See Lin et al., *supra* note 96, at 125–53.

**147.** See Joseph E. Stiglitz, *Whither Socialism?* (Cambridge, MA, 1994), 111.



incompatible with the interest of the principal, the state. Examples are selling state assets too cheaply or choosing to contract with parties who are related to them or who most heavily bribed them. However, even when the managers are convicted for corruption or abuse of power by a government or SOE employee, the contract itself is still valid. The courts do not have a solid theoretical ground to annul such contracts on their own initiative or upon the request of the aggrieved party unless fraud or duress can be proved.<sup>148</sup> Will theories deny there is a just price for things, as the value is subjective and “depends on the mere judgment of men.”<sup>149</sup> Therefore, in principle, both common law and civil law rejected relief for an unjust price.<sup>150</sup> However, the premise for such a view is that a reasonable person should determine his own fate by contracting and therefore bear the negative consequence of a bad bargain. However, this argument does not apply to Chinese SOE managers, who would contract on behalf of the state while having the state bear the negative consequence.

## II. INSTITUTIONS

### A. THE WEST

#### 1. Germany and the United States

**John H. Langbein,\* “The German Advantage in Civil Procedure,” *University of Chicago Law Review* 52 (1985), 823–65**

Our lawyer-dominated system of civil procedure has often been criticized both for its incentives to distort evidence and for the expense and

**148.** Art. 52, section 1 of the Contract Law provides a leeway for SOEs to back out of a contract by arguing that state interest, which is represented by the SOE’s financial interest, was harmed by fraud and duress, and the contracts, though for various reasons were not annulled previously under other doctrines, could now be declared absolutely null. See generally Jiang, *Enlarged State Power to Declare Nullity*.

**149.** See James Gordley, “Equality in Exchange,” 69 *California Law Review* (1981), 1587, at 1592.

**150.** See *ibid.*

\*, Max Pam Professor of American and Foreign Law, University of Chicago Law School; Russell Baker Scholar (1985). Scholars, judges, and practitioners in the US and Germany have favored me with suggestions for research or have commented on prepublication drafts. Among those whose

help has most proximately affected this paper, although not always in directions that they would have preferred, are Albert Alschuler, Erhard Blankenburg, Mauro Cappelletti, Gerhard Casper, Mary Ann Glendon, Geoffrey Hazard, Benjamin Kaplan, Robert Keeton, Hein Kötz, John Merryman, Henry Monaghan, Richard Posner, Martin Redish, Mathias Reimann, Erich Schanze, William Schwarzer, Steven Shavell, Geoffrey Stone, Cass Sunstein, and Arthur von Mehren. I am grateful to learned audiences who reacted to this paper in earlier versions at law school workshops at Cornell, Harvard, and Northwestern; at the 1984 meeting of the American College of Trial Lawyers; at the 1985 meeting of the litigation section of the Association of American Law Schools; and at a session of the National Academy of Sciences’ Committee on National Statistics, Panel on Statistical Evidence in the Courts.

complexity of its modes of discovery and trial.<sup>1</sup> The shortcomings inhere in a system that leaves to partisans the work of gathering and producing the factual material upon which adjudication depends.

We have comforted ourselves with the thought that a lawyerless system would be worse.<sup>2</sup> The excesses of American adversary justice would seem to pale by comparison with a literally nonadversarial system – one in which litigants would be remitted to faceless bureaucratic adjudicators and denied the safeguards that flow from lawyerly intermediation.

*The German Advantage.* The main theme of this article is drawn from Continental civil procedure, exemplified for me by the system that I know reasonably well, the West German.<sup>3</sup> My theme is that, by assigning judges rather than lawyers to investigate the facts, the Germans avoid the most troublesome aspects of our practice. But I shall emphasize that the familiar contrast between our adversarial procedure and the supposedly nonadversarial procedure of the Continental tradition has been grossly overdrawn.

To be sure, since the greater responsibility of the bench for fact-gathering is what distinguishes the Continental tradition, a necessary (and welcome) correlative is that counsel's role in eliciting evidence is greatly restricted. Apart from fact-gathering, however, the lawyers for the parties play major and broadly comparable roles in both the German and American systems. Both are adversary systems of civil procedure.<sup>4</sup> There as here, the lawyers advance partisan positions from first pleadings to final arguments. German litigators suggest legal theories and lines of factual inquiry, they superintend and supplement judicial examination of witnesses, they urge inferences from

1. *E.g.*, JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949); Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA.L.REV. 1031 (1975); Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND.L. REV. 1295, 1298–1303 (1978).

2. *E.g.*, STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 38, 40–41, 43 (1984).

3. A somewhat similar account of Continental practice could be based upon other Western European systems, although details would differ, particularly as one moves from the Northern European systems that have been most influenced by Austrian–German legal culture, to the systems of Southern Europe, where judicial domination of fact-gathering is less prominent and where less adequate resources have been devoted to developing and motivating the bench. See Cappelletti, *Social and Political Aspects of Civil Procedure – Reforms and Trends in Western*

*and Eastern Europe*, 69 MICH.L.REV. 847, 858–59 (1971).

4. Von Mehren remarks that, especially by contrast with criminal procedure, where adversarial components are thoroughly subordinated in the Continental tradition, “the civil-procedure systems of France, Germany and the United States were – and remain – adversarial.” Von Mehren, *The Significance for Procedural Practice and Theory of the Concentrated Trial: Comparative Remarks*, in 2 EUROPÄISCHES RECHTSDENKEN IN GESCHICHTE UND GEGENWART: FESTSCHRIFT FÜR HELMUT COING 361 n.3 (N. Horn, ed. 1982). When writers take the shortcut and speak of German or other Continental civil procedure as “nonadversarial” (a usage that I think should be avoided although I confess to having been guilty of it in the past), the description is correct only in so far as it refers to that distinctive trait of Continental civil procedure, judicial conduct of fact-gathering.



fact, they discuss and distinguish precedent, they interpret statutes, and they formulate views of the law that further the interests of their clients. I shall urge that German experience shows that we would do better if we were greatly to restrict the adversaries' role in fact-gathering.

*Convergence.* The concluding theme of this article directs attention to recent trends in American civil procedure. Having developed the view that judicialized fact-gathering has immense advantages over traditional American practice, I point to the growing manifestations of judicial control of fact-gathering in certain strands of federal procedure. The *Manual for Complex Litigation*<sup>5</sup> is infused with notions of judicial management of fact-gathering for the multi-party Big Case, but there has been no natural stopping place, and these techniques have been seeping into the conduct of ordinary litigation in the development that has been called "managerial judging."<sup>6</sup>

In principle, managerial judging is more compatible with the theory of German procedure than with our own. Having now made the great leap from adversary control to judicial control of fact-gathering, we would need to take one further step to achieve real convergence with the German tradition: from judicial control to judicial conduct of the fact-gathering process. In the success of managerial judging, I see telling evidence for the proposition that judicial fact-gathering could work well in a system that preserved much of the rest of what we now have in civil procedure.

I should emphasize, however, that the main concern of this article is not the sprawling Big Case, but the traditional bipolar lawsuit in contract, tort, or entitlement. The Big Case is testing and instructive but quantitatively unimportant. Ordinary litigation is the place to compare and to judge civil procedural systems.<sup>7</sup>

*Outline.* After sketching the main features of German civil procedure (Part I), I contrast the striking shortcomings of American procedure: the wastefulness and complexity of our division into pretrial and trial procedure (Part II), and the truth-defeating distortions incident to our system of partisan preparation and production of witnesses (Part III) and experts. I devote special attention to the German practice in obtaining impartial expert testimony (Part IV). I pause to notice how flimsy are the theoretical justifications that have been advanced in support of adversary domination of fact-gathering in civil litigation (Part V). Because a more judge-centered fact-gathering process would direct attention to the powers of the bench, I describe the incentive structure of the German career judiciary (Part VI) and the appellate safeguards for litigants (Part VII). Finally, I point to the potential for

5. MANUAL FOR COMPLEX LITIGATION (5th ed. 1982).

6. Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

7. Regarding the role of the Small Case in these developments, see *infra* note 138.

the convergence of the two systems arising from the appearance of managerial judging in the United States (Part VIII).

## I. Overview of German Civil Procedure<sup>8</sup>

There are two fundamental differences between German and Anglo-American civil procedure, and these differences lead in turn to many others. First, the court rather than the parties' lawyers takes the main responsibility for gathering and sifting evidence, although the lawyers exercise a watchful eye over the court's work. Second, there is no distinction between pretrial and trial, between discovering evidence and presenting it. Trial is not a single continuous event. Rather, the court gathers and evaluates evidence over a series of hearings, as many as the circumstances require.<sup>9</sup>

8. Readers interested in the detail of the German system will find, in addition to the indigenous treatises, a surprisingly rich English-language literature. The remarkable mini-treatise, Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure* (pts. 1 & 2), 71 HARV. L. REV. 1193, 1443 (1958) [hereafter cited as Kaplan-von Mehren], although approaching its thirtieth anniversary, remains fundamentally accurate. See also 2 E.J. COHN, *MANUAL OF GERMAN LAW* 162–248 (2d ed. 1971). For comparative observations growing out of the Kaplan-von Mehren study, see Kaplan, *Civil Procedure – Reflections on the Comparison of Systems*, 9 BUFFALO L. REV. 409 (1960) [hereafter cited as Kaplan]. William B. Fisch updated the Kaplan-von Mehren article, with particular attention to the 1977 amendments that are discussed *infra* note 9, in Fisch, *Recent Developments in West German Civil Procedure*, 6 HASTINGS INT'L & COMP. L. REV. 221, 236–60 (1983). On the 1977 reforms see also Gottwald, *Simplified Civil Procedure in West Germany*, 31 AM. J. COMP. L. 687 (1983). Regarding the appellate system, see Meador, *Appellate Subject Matter Organization: The German Design from an American Perspective*, 5 HASTINGS INT'L & COMP. L. REV. 27 (1981). On the differing roles of lawyers, judges, and other legal professionals, see Kötz, *The Role and Functions of the Legal Professions in the Federal Republic of Germany*, in DEUTSCHE LANDESREFERATE ZUM PRIVATRECHT UND HANDELSRECHT, XI INTERNATIONALER KONGRESS FÜR RECHTSVERGLEICHUNG 69 (U. Drobnig & H. Puttfarcken ed. 1982) [hereafter cited as Kötz, *Legal Profession*]; see also DIETRICH RUESCHMEYER, *LAWYERS AND THEIR SOCIETY: A COMPARATIVE STUDY OF THE LEGAL PROFESSION IN GERMANY AND IN THE UNITED STATES* 27–62 (1973).

9. Reforms enacted in 1976 and in force since 1977, based on practice pioneered in Stuttgart and widely known as the "Stuttgart Model," encourage the courts to dispose of a case in a single hearing when circumstances permit. See, e.g., LEO ROSENBERG & KARL-HEINZ SCHWAB, *ZIVILPROZESSRECHT* § 84, at 456–60, § 107, at 614–17 (13th ed. 1981); see *id.* § 107,

at 614 for bibliography. For English-language discussion, see Bender, *The Stuttgart Model*, in 2 ACCESS TO JUSTICE: PROMISING INSTITUTIONS 433 (M. Cappelletti & J. Weisner ed. 1979).

As modified, the code reads: "Ordinarily (*in der Regel*), the case should be resolved in a single hearing, comprehensively prepared." ZIVILPROZESSORDNUNG [ZPO] (Code of Civil Procedure) § 272(I). In aid of this comprehensive preparation, ZPO § 273, formerly ZPO § 272(b), authorizes the court to take various steps in advance of the hearing (for example, requiring the parties to clarify positions, obtaining documents, summoning parties and witnesses to the hearing). Many simpler cases do lend themselves to one-hearing disposition, either through court-aided settlement or by judgment. When this happens the German procedure resembles the American pattern of pretrial preparation followed by a concentrated trial. However, even in such cases, because the court has the option to schedule further hearings if developments at the initial hearing seem to warrant further proofs or submissions, German procedure is devoid of the opportunities for surprise and tactical advantage that inhere in the Anglo-American concentrated trial. See *infra* text accompanying note 23.

For cases that do not lend themselves to one-hearing resolution, the 1977 amendments have not altered the episodic character of the procedure. Further hearings may be ordered as necessary. See, e.g., ZPO § 278(IV). "The whole procedure up to judgment may therefore be viewed as being essentially a series of oral conferences." Kötz, *Civil Litigation and the Public Interest*, 1 CIV. JUST. Q. 237, 243 (1982) [hereafter cited as Kötz, *Civil Litigation*].

German procedure recognizes something called the *Konzentrationsmaxime*, which, if translated as the "principle of concentration" and equated with the rule of concentrated trial in Anglo-American law, is a serious false cognate. The *Konzentrationsmaxime* expresses nothing more than the general efficiency value that the court should handle the case as rapidly as possible, and

*Initiation.* The plaintiff's lawyer commences a lawsuit in Germany with a complaint. Like its American counterpart, the German complaint narrates the key facts, sets forth a legal theory, and asks for a remedy in damages or specific relief.<sup>10</sup> Unlike an American complaint, however, the German document proposes means of proof for its main factual contentions.<sup>11</sup> The major documents in the plaintiff's possession that support his claim are scheduled and often appended; other documents (for example, hospital files or government records such as police accident reports or agency files) are indicated; witnesses who are thought to know something helpful to the plaintiff's position are identified. The defendant's answer follows the same pattern. It should be emphasized, however, that neither plaintiff's nor defendant's lawyer will have conducted any significant search for witnesses or for other evidence unknown to his client. Digging for facts is primarily the work of the judge.<sup>12</sup>

*Judicial Preparation.* The judge to whom the case is entrusted examines these pleadings and appended documents.<sup>13</sup> He routinely sends for relevant public records. These materials form the beginnings of the official dossier, the court file. All subsequent submissions of counsel, and all subsequent evidence-gathering, will be entered in the dossier, which is open to counsel's inspection continuously.

When the judge develops a first sense of the dispute from these materials, he will schedule a hearing and notify the lawyers. He will often invite and sometimes summon the parties as well as their lawyers to this or subsequent hearings. If the pleadings have identified witnesses whose testimony seems central, the judge may summon them to the initial hearing as well.<sup>14</sup>

*Hearing.* The circumstances of the case dictate the course of the hearing. Sometimes the court will be able to resolve the case by discussing it with the lawyers and parties and suggesting avenues of compromise. If the

where possible in a single hearing. See, e.g., ADOLF BAUMBACH, *ZIVILPROZESSORDNUNG* § 253, Übersicht at 634, 2(E) (43d ed. 1985).

10. See ZPO § 253 (complaint); *id.* §§ 271, 274(II) (service on the defendant).

11. ZPO § 253(IV) invokes ZPO § 130, including § 130(5), calling for the party to designate the means of proof he thinks will support his contentions of fact. For a specimen complaint and other items of record from a hypothetical lawsuit rendered in English, see 2 E. COHN, *supra* note 8, at 191–97.

12. For English-language discussion of this point, which is so striking to those of us bred in the Anglo-American tradition, see Kaplan-von Mehren, *supra* note 8, at 1206–07, 1247–49.

13. In former times there was greater use of collegial first-instance courts, but by 1974 the tradeoff between dispatch and safeguard was resolved in favor of dispatch, and ZPO § 348 now presupposes a single-

judge court in most circumstances. For background in English see Fisch, *supra* note 8, at 227–36; on the former practice, see Kaplan-von Mehren, *supra* note 8, at 1206–07, 1247–49.

14. The nineteenth-century tradition that one of the parties had to nominate a witness before the court could examine him (*Verhandlungsmaxime*) has long been something of a fiction, since a party usually detects a strong incentive to follow judicial suggestion in nominating some line of proof. The reforms of the 1970s directed to accelerating the procedure have further accentuated the court's authority to investigate independent of party nomination. For recent complaint from the bar that the bench is straining too far in this direction, see Birk, *Wer führt den Zivilprozess – der Anwalt oder der Richter?* 38 NEUE JURISTISCHE WOCHENSCHRIFT 1489, 1496 (1985).

case remains contentious and witness testimony needs to be taken, the court will have learned enough about the case to determine a sequence for examining witnesses.

*Examining and Recording.* The judge serves as the examiner-in-chief. At the conclusion of his interrogation of each witness, counsel for either party may pose additional questions, but counsel are not prominent as examiners.<sup>15</sup> Witness testimony is seldom recorded verbatim; rather, the judge pauses from time to time to dictate a summary of the testimony into the dossier.<sup>16</sup> The lawyers sometimes suggest improvements in the wording of these summaries, in order to preserve or to emphasize nuances important to one side or the other.

Since the proceedings in a difficult case may require several hearings extending across many months, these summaries of concluded testimony – by encapsulating succinctly the results of previous hearings – allow the court to refresh itself rapidly for subsequent hearings. The summaries also serve as building blocks from which the court will ultimately fashion the findings of fact for its written judgment. If the case is appealed, these concise summaries constitute the record for the reviewing court. (We shall see that the first appellate instance in German procedure involves review *de novo*, in which the appellate court can form its own view of the facts, both from the record and, if appropriate, by recalling witnesses or summoning new ones.<sup>17</sup>)

Anyone who has had to wade through the longwinded narrative of American pretrial depositions and trial transcripts (which preserve every inconsequential utterance, every false start, every stammer) will see at once the economy of the German approach to taking and preserving evidence.<sup>18</sup> Our incentives run the other way; we pay court reporters by the page and lawyers mostly by the hour.

A related source of dispatch in German procedure is the virtual absence of any counterpart to the Anglo-American law of evidence. German law exhibits expansive notions of testimonial privilege, especially for potential witnesses drawn from the family.<sup>19</sup> But German procedure functions without the main chapters of our law of evidence, those rules (such as hearsay) that exclude probative evidence for fear of the inability of the trier of fact to evaluate the evidence purposively. In civil litigation German judges sit without juries (a point to which this essay recurs<sup>20</sup>); evidentiary shortcomings that would affect admissibility in our law affect weight or credit in German law.

*Expertise.* If an issue of technical difficulty arises on which the court or counsel wishes to obtain the views of an expert, the court – in

15. See ZPO §§ 395–97.

16. See Kötz, *Civil Litigation*, *supra* note 9, at 240.

17. See *infra* text accompanying notes 115–20.

18. But see *infra* text accompanying note 79.

19. ZPO §§ 383–89. See generally A. BAUMBACH, *supra* note 9, §§ 383–389, at 1018–29.

20. See *infra* text accompanying notes 144–53.

consultation with counsel – will select the expert and define his role. (This aspect of the procedure I shall discuss particularly in Part IV below.)

*Further Contributions of Counsel.* After the court takes witness testimony or receives some other infusion of evidence, counsel have the opportunity to comment orally or in writing. Counsel use these submissions in order to suggest further proofs or to advance legal theories. Thus, nonadversarial proof-taking alternates with adversarial dialogue across as many hearings as are necessary. The process merges the investigatory function of our pretrial discovery and the evidence-presenting function of our trial. Another manifestation of the comparative efficiency of German procedure is that a witness is ordinarily examined only once. Contrast the American practice of partisan interview and preparation, pretrial deposition, preparation for trial, and examination and cross-examination at trial. These many steps take their toll in expense and irritation.

*Judgment.* After developing the facts and hearing the adversaries' views, the court decides the case in a written judgment that must contain full findings of fact and make reasoned application of the law.<sup>21</sup>

## II. Judicial Control of Sequence

From the standpoint of comparative civil procedure, the most important consequence of having judges direct fact-gathering in this episodic fashion is that German procedure functions without the sequence rules to which we are accustomed in the Anglo-American procedural world. The implications for procedural economy are large. The very concepts of "plaintiff's case" and "defendant's case" are unknown. In our system those concepts function as traffic rules for the partisan presentation of evidence to a passive and ignorant trier. By contrast, in German procedure the court ranges over the entire case, constantly looking for the jugular – for the issue of law or fact that might dispose of the case.<sup>22</sup> Free of constraints that arise from party presentation of evidence, the court investigates the dispute in the fashion most likely to narrow the inquiry. A major job of counsel is to guide the search by directing the court's attention to particularly cogent lines of inquiry.

Suppose that the court has before it a contract case that involves complicated factual or legal issues about whether the contract was formed, and if so, what its precise terms were. But suppose further that the court quickly recognizes (or is led by submission of counsel to recognize) that some factual investigation might establish an affirmative defense – illegality, let us say – that would vitiate the contract. Because the court functions without sequence rules, it can postpone any consideration of issues that we would think of as the plaintiff's case – here the questions concerning the formation and the terms of the contract. Instead, the court can concentrate the entire initial inquiry on what we would regard as a defense. If, in my example, the court were to unearth enough evidence to allow it to conclude that the

21. For discussion of the importance of those safeguards, see *infra* text accompanying notes 110–14.

22. For English-language discussion, see Kaplan-von Mehren, *supra* note 8, at 1208–31, especially 1224–28.



contract was illegal, no investigation would ever be done on the issues of formation and terms. A defensive issue that could only surface in Anglo-American procedure following full pretrial and trial ventilation of the whole of the plaintiff's case can be brought to the fore in German procedure.

Part of what makes our discovery system so complex is that, on account of our division into pretrial and trial, we have to discover for the entire case. We investigate everything that could possibly come up at trial, because once we enter the trial phase we can seldom go back and search for further evidence.<sup>23</sup> By contrast, the episodic character of German fact-gathering largely eliminates the danger of surprise; if the case takes an unexpected turn, the disadvantaged litigant can count on developing his response in another hearing at a later time. Because there is no pretrial discovery phase, fact-gathering occurs only once; and because the court establishes the sequence of fact-gathering according to criteria of relevance, unnecessary investigation is minimized. In the Anglo-American procedural world we value the early-disposition mechanism, especially summary judgment, for issues of law. But for fact-laden issues, our fixed-sequence rule (plaintiff's case before defendant's case) and our single-continuous-trial rule largely foreclose it.

The episodic character of German civil procedure – Benjamin Kaplan called it the “conference method”<sup>24</sup> of adjudication – has other virtues: It lessens tension and theatrics, and it encourages settlement. Countless novels, movies, plays, and broadcast serials attest to the dramatic potential of the Anglo-American trial. The contest between opposing counsel; the potential for surprise witnesses who cannot be rebutted in time; the tricks of adversary examination and cross-examination; the concentration of proof-taking and verdict into a single, continuous proceeding; the unpredictability of juries and the mysterious opacity of their conclusory verdicts – these attributes of the Anglo-American trial make for good theatre. German civil proceedings have the tone not of the theatre, but of a routine business meeting – serious rather than tense. When the court inquires and directs, it sets no stage for advocates to perform. The forensic skills of counsel can wrest no material advantage, and the appearance of a surprise witness would simply lead to the scheduling of a further hearing. In a system that cannot distinguish between dress rehearsal and opening night, there is scant occasion for stage fright.

In this business-like system of civil procedure the tradition is strong that the court promotes compromise.<sup>25</sup> The judge who gathers the facts

23. For discussion of the parallels to discovery waves under the *Manual for Complex Litigation* and to bifurcated trials under Federal Rule of Civil Procedure 42, see *infra* text accompanying notes 134–35.

24. Kaplan, *supra* note 8, at 410.

25. ZPO § 279 imposes upon the court the duty to explore the possibility of a settlement at every stage of the proceeding. “Settlement is sometimes prized as the crown of the judicial function, as the

goal for which a healthy legal system continually strives.” OTHMAR JAUERNIG, *ZIVILPROZESSRECHT* § 48 (VII), at 171 (20th ed. 1983). Kaplan and his coauthors remark: “The intensity and candor of the court’s drive toward settlement will astonish an American observer. In few cases does settlement go unmentioned and it is the judge who generally initiates the discussion.” Kaplan-von Mehren, *supra* note 8, at 1223.

soon knows the case as well as the litigants do, and he concentrates each subsequent increment of fact-gathering on the most important issues still unresolved. As the case progresses the judge discusses it with the litigants, sometimes indicating provisional views of the likely outcome.<sup>26</sup> He is, therefore, strongly positioned to encourage a litigant to abandon a case that is turning out to be weak or hopeless, or to recommend settlement. The loser-pays system of allocating the costs of litigation gives the parties further incentive to settle short of judgment.<sup>27</sup>

### III. Witnesses

Adversary control of fact-gathering in our procedure entails a high level of conflict between partisan advantage and orderly disclosure of the relevant information. Marvin Frankel put this point crisply when he said that “it is the rare case in which either side yearns to have the witnesses, or anyone, give *the whole truth*.”<sup>28</sup>

If we had deliberately set out to find a means of impairing the reliability of witness testimony, we could not have done much better than the existing system of having partisans prepare witnesses in advance of trial and examine and cross-examine them at trial. Jerome Frank described the problem a generation ago:

[The witness] often detects what the lawyer hopes to prove at the trial. If the witness desires to have the lawyer’s client win the case, he will often, unconsciously, mold his story accordingly. Telling and re-telling it to the lawyer, he will honestly believe that his story, as he narrates it in court, is true, although it importantly deviates from what he originally believed.<sup>29</sup>

Thus, said Frank, “the partisan nature of trials tends to make partisans of the witnesses.”<sup>30</sup>

Cross-examination at trial – our only substantial safeguard against this systematic bias in the testimony that reaches our courts – is a frail and fitful palliative. Cross-examination is too often ineffective to undo the

26. The presiding judge is required to discuss the factual and legal aspects of the case with the parties, ZPO § 139(I), and to advise the parties of his doubts, ZPO § 139 (II).

27. ZPO § 91 announces the basic principle, although the details extend across several special statutes, including the Kostenordnung [KostO] (Statute on Costs) and the Bundesrechtsanwaltsgebührenordnung [BRAGO] (Federal Statute on Lawyers’ Fees). See generally 1 STEIN-JONAS, KOMMENTAR ZUR ZIVILPROZESSORDNUNG § 91 Vorbemerkungen at 293–304 (20th ed. 1984). For brief treatment in English, see 2 E. COHN, *supra* note 8, at 182–90; Kaplan-von Mehren, *supra* note 8, at 1461–70; see also Pfennigstorff, *The European Experience with*

*Fee Shifting*, LAW & CONTEMP. PROBS., Winter 1984, at 37; *infra* note 78.

In a valuable recent analysis of the effects of cost-shifting regimes, Steven Shavell makes the point that cost-shifting actually increases the parties’ propensity to litigate in the situation where each overvalues his chances of prevailing. Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 65–66 (1982). The German effort at active judicial clarification of the facts and issues is a counterforce likely to correct such misperceptions much of the time.

28. Frankel, *supra* note 1, at 1038 (emphasis in original).

29. J. FRANK, *supra* note 1, at 86.

30. *Id.*

consequences of skillful coaching. Further, because cross-examination allows so much latitude for bullying and other truth-defeating stratagems, it is frequently the source of fresh distortion when brought to bear against truthful testimony.<sup>31</sup> As a leading litigator boasted recently in an ABA publication: “By a carefully planned and executed cross-examination, I can raise at least a slight question about the accuracy of [an adverse] witness’s story, or question his motives or impartiality.”<sup>32</sup>

When we cross the border into German civil procedure, we leave behind all traces of this system of partisan preparation, examination, and cross-examination of witnesses. German law distinguishes parties from witnesses. A German lawyer must necessarily discuss the facts with his client, and based on what his client tells him and on what the documentary record discloses, the lawyer will nominate witnesses whose testimony might turn out to be helpful to his client. As the proofs come in, they may reveal to the lawyer the need to nominate further witnesses for the court to examine. But the lawyer stops at nominating; virtually never will he have occasion for out-of-court contact with a witness. Not only would such contact be a serious ethical breach, it would be self-defeating. “German judges are given to marked and explicit doubts about the reliability of the testimony of witnesses who previously have discussed the case with counsel or who have consorted unduly with a party.”<sup>33</sup>

No less a critic than Jerome Frank was prepared to concede that in American procedure the adversaries “sometimes do bring into court evidence which, in a dispassionate inquiry, might be overlooked.”<sup>34</sup> That is a telling argument for including adversaries in the fact-gathering process,

31. Wigmore’s celebrated panegyric – that cross-examination is “the greatest legal engine ever invented for the discovery of truth” – is nothing more than an article of faith. 5 JOHN H. WIGMORE, EVIDENCE § 1367, at 29 (3d ed. 1940). Judge Frankel explains why: “The litigator’s devices, let us be clear, have utility in testing dishonest witnesses, ferreting out falsehoods, and thus exposing the truth. But to a considerable degree these devices are like other potent weapons, equally lethal for heroes and villains.” Frankel, *supra* note 1, at 1039.

For a well-known discussion of deliberately misleading techniques of examination and cross-examination, drawn mostly from how-to books, see J. FRANK, *supra* note 1, at 81–85. For recent discussion (by a booster of adversary procedure) of the shortcomings of cross-examination as a remedy for coaching, see Landsman, *Reforming the Adversary Procedure: A Proposal Concerning the Psychology of Memory and the Testimony of Disinterested Witnesses*, 45 U. PITT. L. REV. 547, 570–71 (1984). In the hands of many of its practitioners, cross-examination is not only frequently truth-defeating or

ineffectual, it is also tedious, repetitive, time-wasting, and insulting.

32. Hanley, *Working the Witness Puzzle*, LITIGATION, Winter 1977, at 8, 10.

33. Kaplan-von Mehren, *supra* note 8, at 1201. Kötz has written lately in a similar vein: “German attorneys will be highly reluctant to talk with prospective witnesses. This results in part from an ethical standard as expressed in the canons promulgated by the German Bar Association where it is said: ‘Questioning of witnesses out of court is advisable only when special circumstances justify it. In such questioning even the appearance of attempting to influence the witness must be avoided.’ [Citing *Richtlinien der Bundesrechtsanwaltskammer für die Ausübung des Anwaltsberufs*, § 4 (May 11, 1957).] If any attorneys were prepared to wink at this standard, which is doubtful, they would have to take account of the further fact that German judges would take an extremely dim view of the reliability of witnesses who previously had discussed the case with counsel.” Kötz, *Civil Litigation*, *supra* note 9, at 241.

34. J. FRANK, *supra* note 1, at 80.



but not for letting them run it. German civil procedure preserves party interests in fact-gathering. The lawyers nominate witnesses, attend and supplement court questioning, and develop adversary positions on the significance of the evidence. Yet German procedure totally avoids the distortions incident to our partisan witness practice.

#### IV. Experts

The European jurist who visits the United States and becomes acquainted with our civil procedure typically expresses amazement at our witness practice. His amazement turns to something bordering on disbelief when he discovers that we extend the sphere of partisan control to the selection and preparation of experts. In the Continental tradition experts are selected and commissioned by the court, although with great attention to safeguarding party interests. In the German system, experts are not even called witnesses. They are thought of as “judges’ aides.”<sup>35</sup>

*Perverse Incentives.* At the American trial bar, those of us who serve as expert witnesses are known as “saxophones.” This is a revealing term, as slang often is.<sup>36</sup> The idea is that the lawyer plays the tune, manipulating the expert as though the expert were a musical instrument on which the lawyer sounds the desired notes. I sometimes serve as an expert in trust and pension cases, and I have experienced the subtle pressures to join the team – to shade one’s views, to conceal doubt, to overstate nuance, to downplay weak aspects of the case that one has been hired to bolster. Nobody likes to disappoint a patron; and beyond this psychological pressure is the financial inducement. Money changes hands upon the rendering of expertise, but the expert can run his meter only so long as his patron litigator likes the tune. Opposing counsel undertakes a similar exercise, hiring and schooling another expert to parrot the contrary position. The result is our familiar battle of opposing experts. The more measured and impartial an expert is, the less likely he is to be used by either side.<sup>37</sup>

At trial, the battle of experts tends to baffle the trier, especially in jury courts. If the experts do not cancel each other out, the advantage is likely to be

35. *E.g.*, KURT JESSNITZER, DER GERICHTLICHE SACHVERSTÄNDIGE 72, 78 (7th ed. 1978).

36. Equally revealing is the slang used to describe the preparation of ordinary witnesses: “sandpapering” and “horseshedding.” For remarks on the latter, see MARVIN E. FRANKEL, PARTISAN JUSTICE 15 (1980).

37. Advertisements like the following (from the journal of the trial lawyers’ association) conjure up a vision more of the huckster than of the scientist: “EXPLODING BOTTLES FLYING CAPS[:] expert with 20 years worldwide experience ... 100% success to date.” TRIAL, Feb. 1985, at 92.

One excuse for the litigation-biased expert is the claim that “there is no such thing as a neutral, impartial [expert] witness ... [He] is bound to be biased and partial, and

strongly motivated towards advocacy of his particular prejudiced point of view.” Diamond, *The Fallacy of the Impartial Expert*, 3 ARCHIVES OF CRIM. PSYCHODYNAMICS 221, 229–30 (1959), reprinted in DAVID W. LOUISELL, GEOFFREY C. HAZARD, JR. & COLIN C. TAIT, CASES AND MATERIALS ON PLEADING AND PROCEDURE 842, 846 (5th ed. 1983). However, it is important not to confuse litigation-bias (hiring somebody to conform his views to the needs of your lawsuit) with the good faith differences of opinion that can develop in scientific fields or in other areas of expertise concerning questions that have not been authoritatively resolved. It is true that bias may provoke a difference of opinion; it is false to reason that a difference of opinion must reflect bias.

with the expert whose forensic skills are the more enticing. The system invites abusive cross-examination. Since each expert is party-selected and party-paid, he is vulnerable to attack on credibility regardless of the merits of his testimony. A defense lawyer recently bragged about his technique of cross-examining plaintiffs' experts in tort cases. Notice that nothing in his strategy varies with the truthfulness of the expert testimony he tries to discredit:

A mode of attack ripe with potential is to pursue a line of questions which, by their form and the jury's studied observation of the witness in response, will tend to cast the expert as a "professional witness." By proceeding in this way, the cross-examiner will reap the benefit of a community attitude, certain to be present among several of the jurors, that bias can be purchased, almost like a commodity.<sup>38</sup>

Thus, the systematic incentive in our procedure to distort expertise leads to a systematic distrust and devaluation of expertise. Short of forbidding the use of experts altogether, we probably could not have designed a procedure better suited to minimize the influence of expertise.<sup>39</sup>

*The Continental Tradition.* European legal systems are, by contrast, expert-prone.<sup>40</sup> Expertise is frequently sought. The literature emphasizes the value attached to having expert assistance available to the courts in an age in which litigation involves facts of ever-greater technical difficulty.<sup>41</sup> The essential insight of Continental civil procedure is that credible expertise must be neutral expertise. Thus, the responsibility for selecting and informing experts is placed upon the courts, although with important protections for party interests.

*Selecting the Expert.* German courts obtain expert help in lawsuits the way Americans obtain expert help in business or personal affairs. If you need an architect, a dermatologist, or a plumber, you do not commission a pair of them to take preordained and opposing positions on your problem, although you do sometimes take a second opinion. Rather, you take care to find an expert who is qualified to advise you in an objective manner; you probe his advice as best you can; and if you find his advice persuasive, you follow it.

38. Ryan, *Making the Plaintiff's Expert Yours*, FOR THE DEFENSE, Nov. 1982, at 12, 13; see also Trine, *Cross-examining the Expert Witness in the Products Case*, TRIAL, Nov. 1983, at 86 (taking as its leitmotif the advice from a fisherman's manual that "[t]he concept behind playing a trout is to tire him to the point where he may be easily handled or netted, yet is not at the portals of death").

39. See, for example, the trial judge's account of a proceeding that concerned an issue of Salvadoran law: "[T]he experts for the respective sides contradict each other in every material respect." *Corporacion Salvadorena de Calzado, S.A. v. Injection Footwear Corp.*, 533 F. Supp. 290, 293 (S.D.

Fla. 1982), cited in Merryman, *Foreign Law as a Problem*, 19 STAN.J. INT'L L. 151, 158 n.10 (1983).

40. See generally INSTITUT DE DROIT COMPARÉ DE PARIS, *L'EXPERTISE DANS LES PRINCIPAUX SYSTÈMES JURIDIQUES D'EUROPE* (1969).

41. E.g., Arens, *Stellung and Bedeutung des technischen Sachverständigen im Prozess*, in *EFFEKTIVITÄT DES RECHTSSCHUTZES UND VERFASSUNGSMÄSSIGE ORDNUNG* 299 (P. Gilles ed. 1983). For a volume of conference proceedings largely devoted to this topic, see *DER TECHNISCHE SACHVERSTÄNDIGE IM PROZESS* (F. Nicklisch ed. 1984) (see especially *id.* at 273 ff., for the editor's English-language general report).

When in the course of winnowing the issues in a lawsuit a German court determines that expertise might help resolve the case, the court selects and instructs the expert. The court may decide to seek expertise on its own motion, or at the request of one of the parties.<sup>42</sup> The code of civil procedure allows the court to request nominations from the parties;<sup>43</sup> indeed, the code requires the court to use any expert upon whom the parties agree<sup>44</sup> – but neither practice is typical. In general, the court takes the initiative in nominating and selecting the expert.

The only respect in which the code of civil procedure purports to narrow the court's discretion to choose the expert is a provision whose significance is less than obvious: "If experts are officially designated for certain fields of expertise, other persons should be chosen only when special circumstances require."<sup>45</sup> One looks outside the code of civil procedure, to the federal statutes regulating various professions and trades, for the particulars on official designation.<sup>46</sup> For the professions, the statutes typically authorize the official licensing bodies to assemble lists of professionals deemed especially suited to serve as experts. In other fields, the state governments designate quasi-public bodies to compile such lists. For example, under section 36 of the federal code on trade regulation, the state governments empower the regional chambers of commerce and industry (Industrie- und Handelskammern) to identify experts in a wide variety of commercial and technical fields. That statute directs the empowered chamber to choose as experts persons who have exceptional knowledge of the particular specialty and to have these persons sworn to render professional and impartial expertise.<sup>47</sup> The chamber circulates its lists of experts, organized by specialty and subspecialty, to the courts. German judges receive sheaves of these lists as the various issuing bodies update and recirculate them.

*Current Practice.* In 1984 I spent a little time interviewing judges in Frankfurt about their practice in selecting experts.<sup>48</sup> My sample of a handful of judges is not large enough to impress statisticians, but I think the picture that emerges from serious discussion with people who operate the system is worth reporting. Among the judges with whom I spoke, I found unanimity on the proposition that the most important factor pre-disposing a judge to select an expert is favorable experience with that expert in an earlier case. Experts thus build reputations with the bench. Someone who renders a careful, succinct, and well-substantiated report and who responds effectively to the subsequent

42. See ZPO § 404(I); K. JESSNITZER, *supra* note 35, at 97.

43. ZPO § 404(III).

44. ZPO § 404(IV).

45. ZPO § 404(II).

46. For a list of statutes that authorize licensing and similar bodies to designate experts, see 2 STEIN-JONAS, KOMMENTAR ZUR ZIVILPROZESSORDNUNG § 404(II), at 1674–75 (19th ed. 1972); see also K. JESSNITZER, *supra* note 35, at 122–23.

47. GEWERBEORDNUNG [GEWO] (Code on Trade Regulation) § 36.

48. I wish especially to acknowledge rewarding discussions with Dr. Erika Bokelmann, Richterin am Oberlandesgericht Frankfurt; Dr. Heinrich Götzke, Vorsitzender Richter am Landgericht Frankfurt; and Dr. Ernst Windisch, Richter am Bundesgerichtshof.

questions of the court and the parties will be remembered when another case arises in his specialty. Again we notice that German civil procedure tracks the patterns of decision-making in ordinary business and personal affairs: If you get a plumber to fix your toilet and he does it well, you incline to hire him again.

When judges lack personal experience with appropriate experts, I am told, they turn to the authoritative lists described above. If expertise is needed in a field for which official lists are unavailing, the court is thrown upon its own devices. The German judge then gets on the phone, working from party suggestions and from the court's own research, much in the fashion of an American litigator hunting for expertise. In these cases there is a tendency to turn, first, to the bodies that prepare expert lists in cognate areas; or, if none, to the universities and technical institutes.

If enough potential experts are identified to allow for choice, the court will ordinarily consult party preferences. In such circumstances a litigant may ask the court to exclude an expert whose views proved contrary to his interests in previous litigation or whom he otherwise disdains. The court will try to oblige the parties' tastes when another qualified expert can be substituted. Nevertheless, a litigant can formally challenge an expert's appointment only on the narrow grounds for which a litigant could seek to recuse a judge.<sup>49</sup>

*Preparing the Expert.* The court that selects the expert instructs him, in the sense of propounding the facts that he is to assume or to investigate, and in framing the questions that the court wishes the expert to address.<sup>50</sup> In formulating the expert's task, as in other important steps in the conduct of the case, the court welcomes adversary suggestions. If the expert should take a view of premises (for example, in an accident case or a building-construction dispute), counsel for both sides will accompany him.<sup>51</sup>

*Safeguards.* The expert is ordinarily instructed to prepare a written opinion.<sup>52</sup> When the court receives the report, it is circulated to the litigants. The litigants commonly file written comments, to which the expert is asked to reply. The court on its own motion may also request the expert to amplify his views. If the expert's report remains in contention, the court will schedule a hearing at which counsel for a dissatisfied litigant can confront and interrogate the expert.

The code of civil procedure reserves to the court the power to order a further report by another expert if the court should deem the first report unsatisfactory.<sup>53</sup> A litigant dissatisfied with the expert may encourage the court to invoke its power to name a second expert. The code of criminal procedure has a more explicit standard for such cases, which is worth

49. ZPO § 406(I). See generally A. BAUMBACH, *supra* note 9, § 406, at 1047–49.

50. E.g., PETER ARENS, *ZIVILPROZESSRECHT* 203 (2d ed. 1982).

51. K. JESSNITZER, *supra* note 35, at 183.

52. ZPO § 411(I) authorizes the court to require the expert to report in writing. The

language of the statute may make this look exceptional ("If a written report is ordered ..."), but in practice ordering the report is quite the norm. See K. JESSNITZER, *supra* note 35, at 166–67.

53. ZPO § 412(I).

noticing because the literature suggests that courts have similar instincts in civil procedure.<sup>54</sup> The court may refuse a litigant's motion to engage a further expert in a criminal case, the code says,

if the contrary of the fact concerned has already been proved through the former expert opinion; this [authority to refuse to appoint a further expert] does not apply if the expertise of the former expert is doubted, if his report is based upon inaccurate factual presuppositions, if the report contains contradictions, or if the new expert has available means of research that appear superior to those of a former expert.<sup>55</sup>

When, therefore, a litigant can persuade the court that an expert's report has been sloppy or partial, that it rests upon a view of the field that is not generally shared, or that the question referred to the expert is exceptionally difficult, the court will commission further expertise.<sup>56</sup>

A litigant may also engage his own expert, much as is done in the Anglo-American procedural world, in order to rebut the court-appointed expert. The court will discount the views of a party-selected expert on account of his want of neutrality, but cases occur in which he nevertheless proves to be effective. Ordinarily, I am told, the court will not in such circumstances base its judgment directly upon the views of the party-selected expert; rather, the court will treat the rebuttal as ground for engaging a further court-appointed expert (called an *Oberexperte*, literally an "upper" or "superior" expert), whose opinion will take account of the rebuttal.<sup>57</sup>

To conclude: In the use of expertise German civil procedure strikes an adroit balance between nonadversarial and adversarial values. Expertise is kept impartial, but litigants are protected against error or caprice through a variety of opportunities for consultation, confrontation, and rebuttal.

*The American Counterpart.* It may seem curious that we make so little use of court-appointed experts in our civil practice, since "[t]he inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned"<sup>58</sup> and has been extended and codified in the Federal Rules of Evidence<sup>59</sup> and the Uniform Rules of Evidence (Model Expert Testimony Act).<sup>60</sup> The literature displays both widespread agreement that our courts virtually never exercise this authority, and a certain bafflement about why.<sup>61</sup>

While "simple inertia"<sup>62</sup> doubtless accounts for much (our judges "are accustomed to presiding over acts initiated by the parties"<sup>63</sup>), comparative

54. See, e.g., K. JESSNITZER, *supra* note 35, at 232.

55. STRAFPROZESSORDNUNG [StPO] (Code of Criminal Procedure) § 244(IV). See generally 3 LÖWE-ROSENBERG, DIE STRAFPROZESSORDNUNG UND DAS GERICHTSVERFASSUNGSGESETZ § 244 (IV), ¶¶ 143–150 (23d ed. 1978).

56. See K. JESSNITZER, *supra* note 35, at 231–32.

57. Cf. *id.* at 235–36.

58. FED. R. EVID. 706 advisory committee note.

59. FED. R. EVID. 706.

60. UNIF. R. EVID. 706, 13 U.L.A. 319 (1974).

61. See, e.g., 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 706[01], at 706-8 to -12 (Supp. 1985).

62. Merryman, *supra* note 39, at 165.

63. *Id.*

example points to a further explanation. The difficulty originates with the locktight segmentation of our procedure into pretrial and trial compartments, and with the tradition of partisan domination of the pre trial. Until lately, it was exceptional for the judge to have detailed acquaintance with the facts of the case until the parties presented their evidence at trial. By then the adversaries would have engaged their own experts, and time would no longer allow a court-appointed expert to be located and prepared. Effective use of court-appointed experts as exemplified in German practice presupposes early and extensive judicial involvement in shaping the whole of the proofs. It seems possible that the rise of managerial judging (discussed below in Part VIII) may at last achieve that precondition for effective use of court-appointed experts in our system.<sup>64</sup>

## V. Shortcomings of Adversary Theory

The case against adversary domination of fact-gathering is so compelling that we have cause to wonder why our system tolerates it. Because there is nothing to be said in support of coached witnesses, and very little to be said in favor of litigation-biased experts, defenders of the American status quo are left to argue that the advantages of our adversary procedure counterbalance these grievous, truth-defeating distortions. "You have to take the bad with the good; if you want adversary safeguards, you are stuck with adversary excesses."

*The False Conflict.* This all-or-nothing argument overlooks the fundamental distinction between fact-gathering and the rest of civil litigation. Outside the realm of fact-gathering, German civil procedure is about as adversarial as our own. Both systems welcome the lawyerly contribution to identifying legal issues and sharpening legal analysis.<sup>65</sup> German civil procedure is materially less adversarial than our own only in the fact-gathering function, where partisanship has such potential to pollute the sources of truth.

Accordingly, the proper question is not whether to have lawyers, but how to use them; not whether to have an adversarial component to civil procedure, but how to prevent adversarial excesses. If we were to incorporate the essential lesson of the German system in our own procedure, we would still have a strongly adversarial civil procedure. We would not, however, have coached witnesses and litigation-biased experts.

*The Confusion with Criminal Procedure.* Much of the rhetoric<sup>66</sup> celebrating unrestrained adversary domination of judicial proceedings stems from the criminal process, where quite different policies are at work.<sup>67</sup> It

64. See *infra* text accompanying note 130.

65. See *supra* text accompanying note 4.

66. The obligatory illustration is Lord Brougham's speech in the defense of Queen Caroline: "[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients . . . is his first and only duty. . . ." 2 TRIAL OF QUEEN

CAROLINE 8 (J. Nightingale ed. 1821), cited in Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 n.1 (1976).

67. Monroe Freedman's well-known book, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975), typifies this viewpoint. Regarding limiting this policy to criminal as opposed to civil procedure, see, e.g., Luban, *The Adversary System Excuse*, in *THE GOOD*



has been argued that partisan fact-gathering is appropriate to the special values of criminal procedure – the presumption of innocence, the beyond-reasonable-doubt standard of proof, and the privilege against self-incrimination.<sup>68</sup> Bestowing upon the criminal accused the right to conduct his own fact-gathering, despite the risk that he may misuse this power in truth-defeating ways, can be understood as one more way of adjusting the scales to protect the accused. “The specter of capital punishment and the often barbaric conditions of our penal institutions in the past and present, as well as the unique stigma of conviction of a crime, have had a profound impact upon the protections accorded the defendant and the freedom of action accorded the defense lawyer in a criminal case.”<sup>69</sup> While I happen to disagree that adversary procedure is a particularly effective way to implement our concern for safeguard in the criminal process,<sup>70</sup> my present point is simply that regardless of right or wrong, that concern is absent in the world of civil procedure. In civil lawsuits we are not trying systematically to err in favor of one class of litigants.

*Equality of Representation.* The German system gives us a good perspective on another great defect of adversary theory, the problem that the Germans call “Waffenungleichheit” – literally, inequality of weapons, or in this instance, inequality of counsel. In a fair fight the pugilists must be well matched. You cannot send me into a ring with Muhammed Ali if you expect a fair fight. The simple truth is that very little in our adversary system is designed to match combatants of comparable prowess, even though adversarial prowess is a main factor affecting the outcome of litigation. Adversary theory thus presupposes a condition that adversary practice achieves only indifferently. It is a rare litigator in the United States who has not witnessed the spectacle of a bumbling adversary whose poor discovery work or inability to present evidence at trial caused his client to lose a case that should have been won. Disparity in the quality of legal representation can make a difference in Germany, too, but the active role of the judge places major limits on the extent of the injury that bad lawyering can work on a litigant.<sup>71</sup> In German procedure both parties get the same fact-gatherer – the judge. (I discuss below (in Part VI) the incentives and safeguards designed to attract and motivate able judges.)

LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83, 91–92 (D. Luban ed. 1984); Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RESEARCH J. 543, 548–50.

68. See, e.g., *Garner v. United States*, 424 U.S. 648, 655 (1976), asserting that “the preservation of an adversary system of criminal justice” is “the fundamental purpose of the Fifth Amendment.”

69. Schwartz, *supra* note 67, at 550.

70. It seems unlikely that privatized fact-gathering favors the accused in American criminal procedure. In the typical case the prosecution's greater resources disadvantage the accused by comparison with the nonadversarial fact-gathering of

German criminal procedure. For a discussion of German criminal procedure, see Langbein, *Land without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 206–12 (1979).

71. The active role of the German judge extends to matters of law as well as fact. The discussion of this point in the Kaplan-von Mehren article remains quite sound: There is “an overriding principle of German law, *jura novit curia*, the court knows – and is bound to apply – general law without prompting from the parties.” Kaplan-von Mehren, *supra* note 8, at 1224–25 (discussing ZPO § 139); cf. *id.* at 1227–28.



*Prejudgment.* Perhaps the most influential justification for adversary domination of fact-gathering has been an argument put forward by Lon Fuller: Nonadversarial procedure risks prejudgment – that is, prematurity in judgment.<sup>72</sup> Fuller worried that the judge would make up his mind too soon:

What generally occurs in practice is that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is waiting for the case and, without awaiting further proofs, this label is promptly assigned to it . . .

An adversary presentation seems the only effective means for combating this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, there is time to explore all of its peculiarities and nuances.<sup>73</sup>

This passage obtains much of its force from the all-or-nothing contrast that so misdescribes German civil procedure. In a system like the German, which combines judicial fact-gathering with vigorous and continuing adversarial efforts in nominating lines of factual inquiry and analyzing factual and legal issues, the adversaries perform just the role that Fuller lauds, helping hold the decision in suspension while issues are framed and facts explored.

In German procedure counsel oversees and has means to prompt a flagging judicial inquiry; but quite apart from that protection, is it really true that a “familiar pattern” would otherwise beguile the judge into investigating too sparingly? If so, it seems odd that this asserted “natural human tendency” towards premature judgment does not show up in ordinary business and personal decision-making, whose patterns of inquiry resemble the fact-gathering process in German civil procedure. Since the decision-maker does his own investigating in most of life’s decisions, it seems odd to despair of prematurity only when that normal mode of decision-making is found to operate in a courtroom. Accordingly, I think that Fuller overstates the danger of prematurity that inheres in allowing the decision-maker to conduct the fact-gathering; but to the extent that the danger is real, German civil procedure applies just the adversarial remedy that Fuller recommends.<sup>74</sup>

**72.** Fuller’s argument is usually cited to a speech text, Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 30 (H. Berman ed. 1961). See, e.g., Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 672 n.5 (1978) (citing that work as “[t]he first successful attempt to analyze the adversary system”). Fuller’s argument first appeared in the report of a body known as the Joint Conference on Professional Responsibility. *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958) [hereafter cited as Fuller]. Randall cosigned the report for the ABA but

must have had nothing to do with writing it. Portions of Fuller’s argument were republished in the posthumously assembled work that appeared as Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 383 (1978).

**73.** Fuller, *supra* note 72, at 1160.

**74.** The assumption that adversary procedure corrects for the dangers of prejudgment needs itself to be probed. I have known American litigators to complain of particular judges tending to make up their minds too soon, even on the pleadings.

*Depth.* Fuller's concern about prematurity shades into a different issue: how to achieve appropriate levels of depth in fact-gathering. Extra investment in search can almost always turn up further proofs that would be at least tenuously related to the case. Adversary domination of fact-gathering privatizes the decision about what level of resources to invest in the case. The litigants who are directly interested in the outcome decide how much to spend on search. In German procedure, by contrast, these partisan calculations of self-interest are subordinated, for a variety of reasons. The initiative in fact-gathering is shared with the judge; and the German system of reckoning and allocating the costs of litigation is less sensitive to the cost of incremental investigative steps than in our system where each side pays for the proofs that it orders.<sup>75</sup> On the other hand, the German judge cannot refuse to investigate party-nominated proofs without reason,<sup>76</sup> and this measure of party control greatly narrows the difference between the two systems.

Writing in 1958, Kaplan and his co-authors recorded their "impression" that German civil "proceedings do not in practice serve as an engine of discovery comparable in strength to the modern American methods,"<sup>77</sup> in part because German courts are hostile to fishing.<sup>78</sup> Further, the authors

75. See sources cited *supra* note 27.

76. A. BAUMBACH, *supra* note 9, § 286, at 749–51, ¶¶ 3(B)(a)–(1).

77. Kaplan-von Mehren, *supra* note 8, at 1246.

78. *Id.* at 1247.

The extreme form of fishing that our discovery process invites, viz., bringing a lawsuit in order to discover whether you might actually have one, is unknown not only in Continental procedure, but in English procedure as well. See, e.g., Jolowicz, *Some Twentieth Century Developments in Anglo-American Civil Procedure*, in 1 *STUDI IN ONORE DI ENRICO TULLIO LIEBMAN* 217, 241–44 (1979).

The absence of fishing-type lawsuits is more a function of the loser-pays cost-shifting principle common to all major legal systems except our own than it is a function of different investigative procedures. In this connection see Kaplan's remarks on aspects of discovery in England:

[R]epresenting a possible loser, the solicitor is interested in holding down the expenses on his own side and in seeing to it that his opponent's reimbursed expenses are kept well within reason; representing a potential winner, he is still concerned lest he incur expenses that will be found inessential and thus will not be reimbursed.

Kaplan, *An American Lawyer in the Queen's Courts: Impressions of English Civil Procedure*, 69 *MICH. L. REV.* 821, 822 (1971).

Hostility to fishing is not confined to other legal systems, nor based solely on

considerations of efficiency. Judge Rifkind lamented a decade ago that

the power for the most massive invasion into private papers and private information is available to anyone willing to take the trouble to file a civil complaint. A foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the fourth amendment.

Rifkind, *Are We Asking Too Much of Our Courts?* 70 *F.R.D.* 96, 107 (1976).

Although the Kaplan-von Mehren article correctly observes that German hostility to fishing is a tension point in the contrast with American practice, the example that the authors choose to illustrate the point is wrong. Without citation to authority, they say: "Suppose an eyewitness to an occurrence, testifying in court, states that another person was present: is it permissible [for the court or the adversaries] to ask him then and there to give up the person's name? The answer commonly given is no." Kaplan-von Mehren, *supra* note 8, at 1247. However, the authors continue, "there is no bar to a party's asking the witness the same question in the court corridor," *id.*, after which, presumably, that side would nominate the newly-identified witness for subsequent judicial examination. I have put this example to countless German legal professionals familiar with German civil procedure, and I have never found one who thought it was other than flatly wrong. Whatever the etiquette may have been in Hamburg in the 1950s when Kaplan and his

worried that the technique of recording witness testimony in succinct summaries could bleach out “[f]ine factual differentiations.”<sup>79</sup> They found German procedure to be “far less preoccupied than the American with minute investigation of factual detail of reliability of individual witnesses.”<sup>80</sup>

Defenders of the American status quo may take too much comfort from these observations. A main virtue of German civil procedure, we recall, is that the principle of judicial control of sequence works to confine the scope of fact-gathering to those avenues of inquiry deemed most likely to resolve the case. Fact-gathering occurs when the unfolding logic of the case dictates that investigation of particular issues is needed. That practice does indeed contrast markedly with the inclination of American litigators “to leave no stone unturned, provided, of course, they can charge by the stone.”<sup>81</sup> The primary reason that German courts do less fact-gathering than American lawyers is that the Germans eliminate the waste. Likewise, when American observers notice that there is less harrying of witnesses with “those elaborate testings of credibility familiar to American courtrooms,”<sup>82</sup> I incline to think that the balance of advantage rests with the Germans, since so much of what passes for cross-examination in our procedure is deliberately truth-defeating.<sup>83</sup>

Interestingly, detractors of Continental procedure have also voiced the opposite criticism – complaining of excessive rather than inadequate depth. Stephan Landsman, for example, defending American adversary practice against the complaint that it sets too low a value on the discovery of material truth, warns against inquisitorial zeal. “The weakness of human perception, memory, and expression will often render the discovery of material truth impossible. To become preoccupied with truth may be both naive and futile. It is to the advantage of the adversary system that it does not define its objectives in such an absolute and unrealistic fashion.”<sup>84</sup> This argument overlooks a crucial distinction – between the case with unknowable facts and the case in which the truth-defeating excesses of American adversary fact-gathering cause knowable facts to be obscured. The former scarcely excuses the latter. I side with Blackstone in thinking that fact-finding is the central task of civil litigation. “[E]xperience will abundantly shew,” he wrote, “that above a hundred of our lawsuits arise from disputed facts, for

coauthors were at work, there is today no convention restricting judge or counsel from following up such leads during the course of courtroom examination of a witness.

**79.** Kaplan-von Mehren, *supra* note 8, at 1236.

**80.** *Id.* at 1237. In a similar vein the authors observe that the German judge’s “questing attitude” toward developing the case, encouraged by ZPO § 139 (on which, see *supra* note 71), tends “to debilitate German lawyers by providing them with an inward excuse for sloppy work,” although “it would be hard to say whether in the long run this is outweighed by benefits, such as helping the party represented by an

ineffective lawyer.” Kaplan-von Mehren, *supra* note 8, at 1228. Followers of the public speeches of Chief Justice Warren Burger are aware that concern about the extent of sloppy lawyering is not confined to Germany. Sloppiness aside, it is certainly the case that, because German judges bear the main responsibility for fact-gathering, German lawyers do less (and get paid less) than American lawyers. See *infra* note 89.

**81.** Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 635 (1985).

**82.** Kaplan-von Mehren, *supra* note 8, at 1236.

**83.** See *supra* note 31.

**84.** S. LANDSMAN, *supra* note 2, at 36.

one where the law is doubted of.”<sup>85</sup> Resolve the facts, resolve what actually happened, and the law usually takes care of itself.

The choice between adversarial and judicial conduct of fact-gathering need not correlate strongly with the level of search achieved in a legal system. Factors unrelated to that choice, such as the clarity of the substantive law or the attitude toward fishing, will influence the levels of search. If the Germans saw any virtue in the American practice of allowing the adversaries to cascade each other with undigested files and records, they could in principle incorporate our luxuriant fishing tradition into their procedure (perish the thought) while still preferring court-appointed experts and forbidding adversary contact with nonparty witnesses. Furthermore, within the realm of judge-conducted fact-gathering, we would expect the levels of search to vary significantly among legal systems, depending upon the incentives for judicial diligence, the scope of adversary oversight, and the effectiveness of appellate review.

## VI. Judicial Incentives

Viewed comparatively from the Anglo-American perspective, the greater authority of the German judge over fact-gathering comes at the expense of the lawyers for the parties. Adversary influence on fact-gathering is deliberately restrained. Furthermore, in routine civil procedure, German judges do not share power with jurors. There is no civil jury.<sup>86</sup>

Because German procedure places upon the judge the responsibility for fact-gathering, the danger arises that the job will not be done well. The American system of partisan fact-gathering has the virtue of its vices: It aligns responsibility with incentive. Each side gathers and presents proofs according to its own calculation of self-interest. This privatization is an undoubted safeguard against official sloth. After all, who among us has not been treated shabbily by some lazy bureaucrat in a government department? And who would want to have that ugly character in charge of one's lawsuit?

The answer to that concern in the German tradition is straightforward: The judicial career must be designed in a fashion that creates incentives for diligence and excellence. The idea is to attract very able people to the bench, and to make their path of career advancement congruent with the legitimate interests of the litigants.

*The career judiciary.* The distinguishing attribute of the bench in Germany (and virtually everywhere else in Europe) is that the profession of judging is separate from the profession of lawyering. Save in exceptional

85. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 330 (1768). This emphasis on fact-finding as the central function of the civil procedural system remains, I believe, the dominant view both in the Anglo-American tradition and in Continental civil procedure. I think that the work of John Thibaut and Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541 (1978), does not represent a true departure from this view. When the authors call it a “misconception that the fundamental

objective of the legal process is the discovery of truth,” *id.* at 556, they are not denying that the proper work of the legal system is typically to establish the sequence of past events. Rather, they are pointing out that the experimental method for ascertaining truth in the sciences must be largely foreclosed to the law, in part because legal disputes so characteristically do arise out of past facts.

86. See *infra* text accompanying notes 144–53.

circumstances, the judge is not an ex-lawyer like his Anglo-American counterpart. Rather, he begins his professional career as a judge.

In Germany judges and lawyers undergo a common preparatory schooling. After completing a prescribed course of university legal education that lasts several years,<sup>87</sup> the young jurist sits a first state examination. After passing this examination satisfactorily, he enters upon an apprenticeship that now lasts two and one-half years. He clerks for judges in the civil and criminal courts, assists in the prosecutor's office, and works in a lawyer's office. At the conclusion of this tour of duty, the young jurist sits a second state examination, remotely akin to our bar examination, which concludes the certification process. Thereafter, the career lines of judge and lawyer diverge.

*Recruitment.* Although West Germany is a federal state, the state and federal courts comprise an integrated system. The courts of first instance and the first layer of appellate courts are state courts, while the second (and final) layer of appellate jurisdiction operates at the federal level.<sup>88</sup> Thus, even though the basic codes of civil and criminal law and procedure are federal codes, the state courts have exclusive jurisdiction until the final appellate instance. It follows that most judges are state judges;<sup>89</sup> and since appointment to the federal bench is by way of promotion from the state courts,<sup>90</sup> all entry-level recruitment to the bench occurs at the state level.

In each of the eleven federal states, the ministry of justice is responsible for staffing the courts. Entry-level vacancies are advertised and applications entertained from young jurists. The judiciary is a prized career: influential, interesting, secure, and (by comparison with practice of the bar) prestigious and not badly compensated. "[O]nly the graduates with the best examination results have any chance of entering the judicial corps."<sup>91</sup>

*Advancement.* A candidate who is accepted begins serving as a judge without any prior legal-professional experience, typically in his late twenties.<sup>92</sup> At the outset his position is probationary, although he must

87. For good English-language accounts see RUDOLF B. SCHLESINGER, *COMPARATIVE LAW: CASES, TEXT, MATERIALS* 157–82 (4th ed. 1980); Griess, *Legal Education in the Federal Republic of Germany*, 14 J. Soc'y Pub. Tchrs. L. 166 (1978).

88. For detailed discussion in English, see Meador, *supra* note 8.

89. Data for 1983 appears in STATISTISCHES BUNDESAMT, *STATISTISCHES JAHRBUCH 1984 FÜR DIE BUNDESREPUBLIK DEUTSCHLAND* 338 (1984). Table 15.2, "Judges in State and Federal Service," shows 16,429 state and 493 federal judges.

Using data for the year 1973, Kötz estimates that about one German lawyer in five is a judge. "To the foreign observer," he notes, "the most conspicuous feature of the German legal profession is perhaps the very large judiciary..." Kötz, *Legal Profession*, *supra* note 8, at 71. The size of the German bench is, of course, no mystery. "The real

reason that the Germans need more judges is the same reason that they need fewer lawyers: their civil procedure assigns to the judiciary much of the workload that we leave to private counsel." Langbein, *Judging Foreign Judges Badly: Nose Counting Isn't Enough*, JUDGES' J., Fall 1979, at 4, 6.

90. Except for the federal constitutional court, discussed *infra* text accompanying note 101.

91. Manfred Wolf, *Ausbildung, Auswahl und Ernennung der Richter*, in HUMANE JUSTIZ: DIE DEUTSCHEN LANDESBERICHTÉ ZUM ERSTEN INTERNATIONALEN KONGRESS FÜR ZIVILPROZESSRECHT IN GENT 1977, at 73, 77 (P. Gilles, ed. 1977).

92. *Id.* For English-language discussion of the recruitment and promotion process in Bavaria, see Meador, *German Appellate Judges: Career Patterns and American-English Comparisons*, 67 JUDICATURE 16, 21–25 (1983).



be promoted to tenure or dismissed within five years.<sup>93</sup> His first assignment may be to a court of petty jurisdiction (Amtsgericht), or else he will become the junior member of a collegial chamber of the main court of general jurisdiction (Landgericht, hereafter LG), where he can receive guidance from experienced judges.<sup>94</sup>

The work of a German judge is overseen and evaluated by his peers throughout his career, initially in connection with his tenure review, and thereafter for promotion through the several levels of judicial office and salary grades. A judge knows that his every step will be grist for the regular periodic reviews that will fill his life-long personnel file. His “efficiency rating”<sup>95</sup> is based in part upon objective factors, such as caseload discharge rates and reversal rates, and in part on subjective peer evaluation. The presiding judge of a chamber has special responsibility for evaluating the work of the younger judges who serve with him, but the young judges are rotated through various chambers in the course of their careers, and this reduces the influence of an aberrant rating from any one presiding judge. These evaluations by senior judges pay particular regard to (1) a judge’s effectiveness in conducting legal proceedings, including fact-gathering, and his treatment of witnesses and litigants; and (2) the quality of his opinions – his success in mastering and applying the law to his cases.<sup>96</sup>

This meritocratic system of review and promotion is meant to motivate the judge to perform at his best. In the main first-instance court (LG), which is sectioned into many three-judge panels called chambers, the judge aspires to advance to the position of presiding judge of a chamber, a job of greater importance and status with corresponding salary improvement. From there the main career path leads to the first appellate instance (Oberlandesgericht, hereafter OLG), which is also divided into many chambers, each led by a presiding judge who is promoted to that job after distinguishing himself as an ordinary judge of the court.<sup>97</sup> And the final appellate instance, the federal supreme court for nonconstitutional law (Bundesgerichtshof, hereafter BGH), is staffed almost entirely with judges who have been promoted from the OLG.<sup>98</sup>

**93.** DEUTSCHES RICHTERGESETZ [DRiG] (Statute on the German Judiciary) § 12(2). DRiG § 22 governs the grounds for dismissing an untenured judge; see GÜNTHER SCHMIDT-RANTSCH, DEUTSCHES RICHTERGESETZ § 22, at 202–08 (3d ed. 1983). There are special rules limiting the competence of untenured judges, DRiG §§ 27–29, in order to assure litigants that major decisional responsibility will be in the hands of tenured (i.e., unquestionably independent) judges. See EDUARD KERN & MANFRED WOLF, GERICHTSVERFASSUNGSRECHT 138–39 (5th ed. 1975).

**94.** Although much of the work of a LG chamber is now assigned to a single judge for discharge without collegial participation, see *supra* note 13, the basic unit of organization remains the collegial chamber, and there is still an important residue of collegial first-instance business.

**95.** Herrmann, *The Independence of the Judge in the Federal Republic of Germany*, in

CONTEMPORARY PROBLEMS IN CRIMINAL JUSTICE: ESSAYS IN HONOUR OF PROFESSOR SHIGEMITSU DANDO 61, 73 (1983).

**96.** These factors were mentioned to me repeatedly in 1984 when I had occasion to inquire about the promotion process in interviews with German judges and with German law professors specializing in civil procedure and judicial administration. See *also infra* note 113 and accompanying text.

**97.** Wolf, *supra* note 91, at 77; see *also* Meador, *supra* note 92, at 22–23.

**98.** Meador, *supra* note 92, at 24–25. The BGH now has more than a hundred judges and a dozen chambers. Call to that court is perhaps not quite the prize that we might imagine the pinnacle to be. There has been some concern that not enough of the best OLG judges aspire to join the BGH, despite the enhancement in rank, authority, and compensation that promotion to the BGH entails. The opportunity for promotion to the BGH usually comes when a judge is well

Meritocratic review and promotion are meant to reward and thereby to inspire judges to be diligent in fact-gathering, to stay current in the law, and to be fair and accurate in the conduct of hearings and the rendering of judgments.

*Specialization.* I have been speaking throughout this article of the ordinary courts. Of the 17,000 judges who were sitting in Germany as of 1983, the most recent year for which the statistics are published, 13,000 sat in the ordinary courts.<sup>99</sup> The others served in the specialized court systems for administrative law, tax and fiscal matters, labor and employment law, and social security.<sup>100</sup> Furthermore, the Germans operate a separate supreme constitutional court (Bundesverfassungsgericht), to which the other courts refer some contentious constitutional business. Appointment to the constitutional court is by design highly political; members are seldom part of the career judiciary that I have been describing.<sup>101</sup>

The specialized courts and the constitutional court siphon off business that Americans would expect to see in the ordinary courts. Within the German ordinary courts of first instance there are special divisions that have counterparts in our tradition – for crime, for what we would call probate, for domestic relations. In addition, commercial law matters are removed to specialized chambers.<sup>102</sup> Thus, the German ordinary courts of first instance have a somewhat narrower diet than our own.

At the appellate level, including the first appellate instance (OLG) that proceeds by review *de novo*, there is extensive specialization. An OLG is quite large by our standards, sometimes staffed with more than a hundred judges, who sit in chambers containing four or five judges. Cases are allocated among these chambers on the basis of subject matter.<sup>103</sup> All the medical malpractice cases go to one chamber, the maritime cases to another, and so forth. This system permits the judges to develop over the years just that sort of expertise in legal subspecialties that we expect of lawyers, particularly lawyers in large-firm practice, in the United States.

into his forties or fifties and long settled in his home state. The BGH sits in Karlsruhe, an unexciting city on the southwestern fringe of the country. Some prominent OLG judges decline to exile themselves and their families to Karlsruhe from life in Munich, Dusseldorf, Frankfurt, or Hamburg. We can imagine the problem in American terms by supposing that we had created a supreme court of nonconstitutional law and sited it in Akron, Boise, or Macon; perhaps we would have found Learned Hand and Henry Friendly not too anxious for that last round of promotion. But laying aside this peculiarity about the BGH, it can be said with great confidence that most German judges aspire to maximize their chances for promotion through the lower levels of the pyramid.

**99.** STATISTISCHES BUNDESAMT, *supra* note 89, at 338 (Table 15.2).

**100.** For discussion in English, see ARTHUR T. VON MEHREN & JAMES R. GORDLEY, *THE CIVIL LAW SYSTEM* 133–37 (2d ed. 1977);

Meador, *supra* note 8, at 31–34. Continental specialized court systems are distinguished from ours by having their own appellate systems. In the United States, appeal lies from the specialized tax court to the regular courts of appeal, and thereafter to the Supreme Court. In Germany, appeal lies from the tax court to the supreme court for tax matters, with no possibility of review by the federal supreme court of ordinary jurisdiction (BGH).

**101.** For an English-language account, now a little dated, see DONALD P. KOMMERS, *JUDICIAL POLITICS IN WEST GERMANY: A STUDY OF THE FEDERAL CONSTITUTIONAL COURT* 113–59 (1976).

**102.** GERICHTSVERFASSUNGSGESETZ [GVG] (Statute on the Organization of the Courts) §§ 93–95. See generally OTTO R. KISSEL, *GERICHTSVERFASSUNGSGESETZ* §§ 93–95, at 894–911.

**103.** For commentary in English, see Meador, *supra* note 8, at 44–72.



The litigants get judges who know something about the field, in contradistinction to the calculated amateurism of our appellate tradition.<sup>104</sup>

*Political Influence.* Judicial appointments and promotions issue in the name of the state or federal minister of justice, who is an important political official, usually a member of the state or federal parliament and of the cabinet. The minister acts in consultation with an advisory commission of senior judges;<sup>105</sup> in some of the German states that commission has a formal veto power.

Directly political concerns appear to be very subordinated in the selection and advancement of judges. Because this subject is not much ventilated in the literature, I have inquired about it when talking with German judges and legal academics. The impression I have gained is that political considerations do not materially affect appointment or promotion until the level of the federal supreme court (BGH).<sup>106</sup> Party balance is given weight in BGH appointments, but political connections do not substitute for merit. Positions on the BGH go to judges who have distinguished themselves on the OLG.

We must remember that the decision to isolate important components of constitutional and administrative-law jurisdiction outside the ordinary courts in Germany lowers the political stakes in judicial office, by comparison with our system, in which every federal district judge (and for that matter, every state judge) purports to brandish the Constitution and thus to be able to wreak major social and institutional change.

*American Contrasts.* If I were put to the choice of civil litigation under the German procedure that I have been praising in this article or under the American procedure that I have been criticizing, I might have qualms about choosing the German. The likely venue of a lawsuit of mine would be the state court in Cook County, Illinois, and I must admit that I distrust the bench of that court. The judges are selected by a process in which the criterion of professional competence is at best an incidental value.<sup>107</sup> Further, while decent people do reach the Cook County bench in surprising numbers, events have shown that some of their colleagues are crooks. If my lawsuit may fall into the hands of a dullard or a thug, I become queasy about increasing his authority over the proceedings.

**104.** The case for the generalist judiciary is argued anew in RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 147–60 (1985). It would entail a large digression in the present article to detail all of my disagreements with Judge Posner's treatment of this subject. I find particularly unpersuasive Posner's central claim that specialized courts are unworkable in fields where differences of view persist among the specialists. "It is remarkable in how few fields of modern American law there is a professional consensus on fundamental questions." *Id.* at 153. This is an exaggeration, and one that resembles in an eerie way the all-law-is-

politics theme of a contemporary legal-academic movement with which Posner is ordinarily not associated. The truth is that even in fields like constitutional law or torts (Posner's examples) where much is unsettled, there are vast areas of consensus. The work of legal doctrine is to forge consensus. The more learned the court, the more likely is the court to do that job well.

**105.** For discussion of Bavarian practice, see Meador, *supra* note 92, at 22–23.

**106.** See Wolf, *supra* note 91, at 77–78.

**107.** [Citation to an unpublished speech by Justice Seymour Simon of the Illinois Supreme Court.]

German-style judicial responsibility for fact-gathering cannot be lodged with the Greylord judiciary. Remodeling of civil procedure is intimately connected to improvement in the selection of judges. I do not believe that we would have to institute a German-style career judiciary in order to reform American civil procedure along German lines, although I do think that Judge Frankel was right to “question whether we are wise” to disdain the Continental model, and to “wonder now whether we might benefit from some admixture of such [career judges] to leaven or test our trial benches of elderly lawyers.”<sup>108</sup> The difference in quality between the state and federal trial benches in places like Cook County is sufficient to remind us that measures far short of adopting the Continental career judiciary can bring about material improvement.<sup>109</sup>

Americans will long remain uncomfortable at the prospect of a more bureaucratic judiciary. We have not had good experience attracting and controlling an able career bureaucracy in the higher realms of public administration, although we have scarcely tried. Some observers point to that elusive construct, national character. Europeans in general and Germans in particular are thought to be more respectful of authority, hence better disposed toward the more bureaucratic mode of justice that judicialized fact-gathering entails.

Cultural differences surely do explain something of why institutional and procedural differences arise in different legal systems. The important question for present purposes is what weight to attach to this factor, and my answer is, “Not much.” It is all too easy to allow the cry of “cultural differences” to become the universal apologetic that permanently sheathes the status quo against criticism based upon comparative example. Cultural differences that help explain the origins of superior procedures need not restrict their spread. If Americans were to resolve to officialize the fact-gathering process while preserving the political prominence of the higher bench, we would probably turn initially to some combination of judges, magistrates, and masters for getting the job done. Over time, we would strike a new balance between bench and bar, and between higher and lower judicial office.

The rise of American managerial judging (discussed in Part VIII below) should put us on notice that we may no longer have the leisure to decide whether we want more judicial authority over civil litigation. If greater judicial control of civil proceedings is inevitable, greater attention to safeguarding litigants’ interests against abuse of judicial power must follow. The German model should inspire attention to the way judicial

**108.** Frankel, *supra* note 1, at 1033.

**109.** Part of what makes the federal bench more attractive – that the supremacy clause makes federal judges more powerful – is beyond emulation. But other attributes of the federal judicial career that could be copied must affect the quality of the recruits. For example, the federal salary scale, while hardly munificent, is significantly better than at the state level, especially when account is taken of the generous federal judicial pension

scheme. Lifetime tenure makes the federal judicial career more attractive, sparing federal judges from the career uncertainty and indignity to which state trial judges are exposed through the elective process, on which see *supra* note 107. The appointive process for selecting judges enhances the influence of the organized bar and other interest groups that have some concern to assure professional competence in the judiciary.

career incentives (above all, meritocratic selection, review, and promotion) can serve as safeguards for litigants.

## VII. Appellate Review

Like the career incentives that encourage good judicial performance, the German appellate process is designed to protect litigants from caprice, error, or sloth. The adversarial component of lawyerly oversight, to which this article has so often referred, ultimately depends for its effectiveness upon the threat of appellate review. From the standpoint of comparison with American procedure, two attributes of German appellate practice appear especially noteworthy: (1) the requirement, meant to facilitate review, that the first-instance court disclose in writing its findings of fact and reasons of law; and (2) the *de novo* standard of review.

*Disclosure of Grounds.* Unless the first-instance court is successful in encouraging the parties to settle,<sup>110</sup> it must decide the case by means of a written judgment containing findings of facts and rulings of law.<sup>111</sup> The thoroughness of the German judgment is legendary.<sup>112</sup> Empirical study has shown how seriously the first-instance courts take their judgment-writing responsibility.<sup>113</sup> Judges know that they will be judged on the quality of their opinions. Good opinions reduce the reversal rate and win esteem in the peer evaluation process. Judges know that the reviewing court will have convenient access to the whole of the evidence and the submissions received at first-instance, since the dossier goes up with the appeal. Especially when coupled with searching review by an appellate court of great ability, the requirement of written findings and reasons is a bulwark against arbitrary or eccentric adjudication. In our system, by contrast, the conclusory general verdict of a jury is the antithesis of a reasoned judgment; nor do we insist on much better in the realm of bench trials.<sup>114</sup> Fact-finding in American courts all too often resembles Caligula dealing with vanquished gladiators: thumbs up or thumbs down, yours but to wonder why.

*Review De Novo.* Ultimately, it is the prospect of appellate review in German civil procedure that makes the other safeguards effective, both as deterrents and as correctives. The dissatisfied litigant has the right of appeal *de novo* (*Berufung*) in the first appellate instance (typically the OLG).<sup>115</sup> No presumption of correctness attaches to the initial judgment.

110. See *supra* note 25.

111. ZPO § 313(I)(5)–(6); see 2 STEIN-JONAS, *supra* note 46, § 313(IV)–(V), at 1279–84.

112. See Weyrauch, *The Art of Drafting Judgments: A Modified German Case Method*, 9 J. LEG. ED. 311, 316–26 (1956).

113. In a considerable sample of nondivorce cases that went to judgment (i.e., that resisted settlement) in the main first-instance court (LG), an average 43% of the total time devoted to all aspects of the courts' work (including review of the dossier, fact-gathering, and oral hearings) was spent on writing the judgment. 2

BUNDESRECHTSANWALTSKAMMER, TATSACHEN ZUR REFORM DER ZIVILGERICHTSBARKEIT: AUSWERTUNGEN 64–65 (1974).

114. See Leubsdorf, *Constitutional Civil Procedure*, 63 TEXAS L. REV. 579, 630 & n.311 (1984).

115. Appeal *de novo* lies from the court of petty jurisdiction (*Amtsgericht*) to the court of general jurisdiction (LG). For the LG, which is the main first-instance court, the OLG is the court with responsibility for review *de novo*.

Following are some figures that give a feel for the frequency of appeal *de novo* to the OLG from the LG. In 1981 the LGs had

What makes this astonishingly liberal system of appellate review possible is the extreme economy of the technique, previously discussed, of recording in pithy summaries the evidence gathered at first instance.<sup>116</sup> Retrial becomes for the most part only rereading.

The OLG “may choose to rehear evidence and is likely to do so when demeanor of a witness seems important or when the record fails to give sufficient detail.”<sup>117</sup> The main task in review *de novo* is not, however, gathering new evidence, but considering afresh the record and the judgment from below. OLG review guarantees to the dissatisfied litigant a second look by a panel of long-experienced judges on all matters of law and fact. In other words, for a litigant who wishes it, fact-finding will be reassigned from the court that did the primary fact-gathering (and this is another way in which German procedure may be said to respond to Lon Fuller’s concern about the danger of prejudgment in the investigating court<sup>118</sup>). OLG review is collegial; a panel of several judges decides the case.<sup>119</sup> And because the OLG panels are specialized by subject matter, chances are that some of the judges who decide the case will be masters of the particular field of law.

From the OLG there is a further level of review (by the BGH) according to a standard of review (Revision) that approximates the Anglo-American notion of review for error.<sup>120</sup>

*Adequacy of Safeguards.* There is no denying the power of the German judge, yet complaints about the misuse of judicial power are extremely rare. The career incentives and the system of appellate review have been designed to deter and correct abuse. Experience suggests that they work.

### VIII. American Managerial Judging: Convergence?

Important changes have occurred in recent years that diminish the contrast between German and American civil procedure. Under the rubric of case management, American trial judges are exercising increasing control of the conduct of fact-gathering. Although many American courtrooms remain untouched by the new developments, the changes have occurred broadly enough to have about themselves the look of the future.

The *Manual*. Managerial judging arose in the federal courts as a response to the increasing quantity of so-called “complex litigation” – cases that involve “unusual multiplicity or complexity of factual issues.”<sup>121</sup> The *Manual for Complex Litigation* was created to deal with these cases, but because complexity is a matter of degree, managerial judging was hard

a first-instance caseload of 574,860 cases and the OLGs had a caseload of 85,021. The LGs decided 106,538 cases by full judgment (“streitiges Urteil”), which is the main cohort of cases that can give rise to appeal *de novo*; in the same year the OLG decided 25,299 cases by “streitiges Urteil.” STATISTISCHES BUNDESAMT, *supra* note 89, at 339 (Table 15.4.1).

116. See *supra* text accompanying notes 15–18.

117. Kaplan-von Mehren, *supra* note 8, at 1451; see *id.* at 1453 (discussing the purposes of review *de novo*).

118. See *supra* text accompanying notes 72–74.

119. See Kaplan-von Mehren, *supra* note 8, at 1451.

120. *Id.* at 1454.

121. MANUAL, *supra* note 5, § 0.22.

to confine to the Big Case. The *Manual* identifies antitrust, securities, mass disaster, product liability, class action, and multiparty cases, among others, as typical.<sup>122</sup> In cases with many parties and many issues, the feeling grew that court-centered control was needed to prevent the confusion and duplication that would result if the adversaries were “left to themselves, each pursuing the course that is most favorable to his particular client.”<sup>123</sup> Accordingly, “[t]he essence” of what the *Manual* propounds “is the exercise of judicial control over complex litigation plus a positive plan for discovery and pretrial preparation.”<sup>124</sup>

The *Manual* effects judicial control over adversary fact-gathering through a set of interconnected measures:

- (1) The judge uses pretrial conferences to explore the case with counsel and to identify key issues.<sup>125</sup>
- (2) The judge is expected to promote settlement from the earliest opportunity.<sup>126</sup>
- (3) The judge also helps sharpen the issues. “To the extent feasible the judge should narrow the issues in the course of the first pre-trial conference and limit discovery accordingly.”<sup>127</sup>
- (4) Issue definition leads to the regulation of discovery. The court convenes discovery conferences and breaks discovery into “waves.”<sup>128</sup> Thus, the court decides what subjects may be investigated in what sequence. This power has now been codified for the ordinary Federal Rules of Civil Procedure in revised rule 26(f): “Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing, a plan and schedule for discovery. . . .”<sup>129</sup>
- (5) The *Manual* recommends that the court explore the need for expert testimony early, in part in order “to determine whether court appointment of an expert is desirable.”<sup>130</sup>

*Convergence.* What makes the *Manual* look “proto-Germanic” in the eyes of the comparative lawyer is the informal feel of “the conference

122. *Id.*

123. *Id.* § 1.10.

124. *Id.* (italics deleted).

125. *Id.* § 1.20. The *Manual* also encourages “the practice of obtaining counsel’s views of the case by requiring the filing before discovery of initial pretrial briefs containing all the legal and factual contentions of the parties.” *Id.* We have seen that it is characteristic of German practice that counsel may guide the court’s work by submitting written commentary on issues of law or fact. See *supra* text between notes 20 and 21.

126. *MANUAL*, *supra* note 5, § 1.21.

127. *Id.* § 1.30.

128. *Id.* § 0.50 (“Ordinarily, in a complex case, use of sequential discovery – first

wave, second wave, and special issue – promotes efficiency, orderliness, and early completion of all permissible discovery.”); see also *id.* § 1.50.

129. FED. R. CIV. P. 26(f). “Rule 26(f) mandates the holding of a discovery conference upon proper motion by a party. In the complex case, however, the judge should not ordinarily wait for the filing of such a motion. . . .” *MANUAL*, *supra* note 5, § 1.95. Judge Schwarzer has expressed “dissatisfaction” that the *Manual* is inadequately directive. WILLIAM W. SCHWARZER, *MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION: A HANDBOOK FOR LAWYERS AND JUDGES* § 1–1, at 4 (1982).

130. *MANUAL*, *supra* note 5, § 2.60; see also *id.* § 3.40.



method;<sup>131</sup> and the active judicial role in defining issues, promoting settlement,<sup>132</sup> and fixing the sequence for fact-gathering.

To be sure, managerial judging in the pretrial process leaves adversary domination of the trial (especially jury trial) largely unaffected. But the vast preponderance of cases settle or are dismissed before trial; pretrial procedure is the whole procedure for most of our caseload.<sup>133</sup>

Moreover, judicial control of the pretrial process interacts with certain features of trial procedure. Early identification of issues and issue-specific discovery can lead to issue-specific trial, that is partial trial, under rule 42(b).<sup>134</sup> One could envision manipulating these powers to replicate something of the German court's control over the sequence of issue-identification and fact-gathering in the development of a lawsuit.<sup>135</sup> And under rule 53(c), which empowers the court to refer issues to a master for investigation and report,<sup>136</sup> one could imagine further movement toward judicial conduct of fact-gathering. That is, however, still a glimmer; the important trend has been toward judicial control of the adversaries' conduct of the investigatory function, not judicial conduct of the investigation.

Thus, while managerial judging leaves untouched some of the worst abuses of our trial procedure such as coached witnesses and partisan experts, it has reoriented pretrial procedure away from adversary domination; and in a legal system that actually tries only a tiny fraction of its civil caseload, judicial capture of pretrial could become more important than continuing adversary control of trial.

The importance of managerial judging ought not to be overstated. Managerial judging is prevalent in the federal courts, but less evident in the state systems where complex litigation is less prevalent. (Many of the state systems also lack an essential predicate for managerial judging, the continuous-case-management system in which a case remains assigned to the same trial judge from initial docketing to final judgment.) Moreover, even within the federal system, managerial judging is routine only for complex cases that require to be dealt with under the *Manual*. Outside

131. See *supra* note 24 and accompanying text. Judith Resnik remarks on the informality of managerial judging, noticing that these conferences resemble "ordinary business meetings." Resnik, *supra* note 6, at 407.

132. Resnik, who popularized the term "managerial judging," observes the similarity to the German practice in promoting settlement as it was described in the Kaplan-von Mehren article. "Ironically, their description of the German judge – '... as insistent promoter of settlements' – now seems apt for the American judge as well." Resnik, *supra* note 6, at 386 (citing Kaplan-von Mehren, *supra* note 8, at 1472).

133. "[O]ver ninety percent of the cases in most courts terminate through settlement or dismissal prior to trial." Miller, *The Adversary System: Dinosaur or Phoenix?* 69 MINN. L. REV. 1, 14 (1984); see *id.* at 4 n.7

(citing ADMINISTRATIVE OFFICE OF U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 1983, at 142 (Table 29)).

134. FED. R. CIV. P. 42(b).

135. See *supra* text accompanying notes 22–27.

136. FED. R. CIV. P. 53(c). But see Brazil, *Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?* 1983 AM. B. FOUND. RESEARCH J. 143. For an account of the work of the court-appointed masters in managing pre-trial procedures in the mammoth AT&T antitrust case, see Hazard & Rice, *Judicial Management of the Pretrial Process in Massive Litigation: Special Masters as Case Managers*, in WAYNE D. BRAZIL, GEOFFREY C. HAZARD, JR. & PAUL R. RICE, *MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS* 77 (1983).

the realm of the Big Case, the litigant gets managerial judging only if, by the fortuity of the case-assignment wheel, he draws a managerial judge. If you get assigned to Robert Keeton or Prentice Marshall or William Schwarzer, you get managerial judging. If you draw a traditional federal district judge, you get old-style adversary domination of the pretrial process. It is hard to imagine that our system can long continue to leave such fundamental choices to luck and whim.

*Safeguards.* Not only does whim determine whether a litigant gets managerial judging, but whim can surface in the conduct of managerial judging. Judith Resnik observes:

[M]anagerial responsibilities give judges greater power. Yet the restraints that formerly circumscribed judicial authority are conspicuously absent. Managerial judges frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of the reach of appellate review.

[B]ecause managerial judging is less visible and usually unreviewable, it gives trial courts more authority and at the same time provides litigants with fewer procedural safeguards to protect them from abuse of that authority.<sup>137</sup>

Viewed from the perspective of comparative law, therefore, American managerial judging displays contrasting tendencies. On the one hand, it exhibits convergence toward the Continental model of judicial domination of the fact-gathering process. On the other hand, the haphazard growth of managerial judging has not been accompanied by Continental-style attention to safeguarding litigants against the dangers inherent in the greatly augmented judicial role. The career incentives for our judiciary are primitive, and the standards of appellate review barely touch the pretrial process.

The trend toward managerial judging is irreversible,<sup>138</sup> because the trend toward complexity in civil litigation that gave rise to managerial

**137.** Resnik, *supra* note 6, at 378, 380. Under the rubric of “managerial judging,” Resnik brings two trends: the one that so interests us in the present article, the growth of judicial participation in the fact-gathering work of the pretrial process; and the phenomenon to which Chayes directed attention a decade ago, the increasing judicial responsibility for devising and adjusting complex remedial orders in the post-trial process, primarily for public law litigation. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

**138.** Resnik’s article, which is so instructive in pointing to the dangers that lurk in unconstrained managerial judging, sometimes conveys the impression that managerial judging is a foible that the judiciary might be persuaded to abandon. *E.g.*, Resnik, *supra* note 6, at 445 (the

federal bench has been “[s]educed by controlled calendars, disposition statistics, and other trappings of the efficiency era and the high-tech age”; further, “[n]o one has convincingly discredited the virtues of disinterest and disengagement, virtues that form the bases of the judiciary’s authority”). This yearning for the golden age of judicial passivity exaggerates the potential for retracing our steps, because it does not give due weight to the factors that gave rise to managerial judging: the growth in complex litigation and the difficulty of distinguishing the Big Case from slightly smaller cases.

In emphasizing the Big Case as the origin of managerial judging in American procedure, I do not mean to imply that I think that managerial judging ought to be confined there. To the contrary, I agree with the point that Hein Kötz has long asserted, most recently in Kötz, *Zur Funktionsteilung*



judging is irreversible. If we were to learn from the success of the long established German tradition of managerial judging, we would not only improve our safeguards, we would encourage more complete judicial responsibility for the conduct of fact-gathering. For example, we might have the judge (or a surrogate such as a master or a magistrate) depose witnesses and assemble the rest of the proofs, working in response to adversary nomination and under adversary oversight as in German procedure. We might then be able to forbid the adversaries from contact with witnesses – in other words, we could abolish the coaching that disgraces our civil justice. We would also be able to routinize the use of court-appointed experts. And if we were to concern ourselves with devising a standard of appellate review appropriate to the seriousness of managerial judging, we might want to experiment with the German technique of succinct recordation of evidence.<sup>139</sup>

*Concentration.* When Kaplan sought “the grand discriminant, the watershed feature, so to speak, which shows the English and American systems to be consanguine and sets them apart from the German, the Italian, and others in the civil-law family,” he found it in our “single-episode trial as contrasted with discontinuous or staggered proof-taking” on the Continent.<sup>140</sup> Arthur von Mehren has advanced a similar view, showing in a recent article how extensively the concentrated trial has affected the rest of our civil procedure.<sup>141</sup>

For the future, however, I doubt that the contrast between systems of concentrated and discontinuous trial will have such prominence in thinking about comparative civil procedure. The tendency of our pretrial process

*zwei-chen Richter und Anwalt im deutschen und englischen Zivil-prozess*, in *FESTSCHRIFT FÜR IMRE ZAJTAY* 277, 290–91 (R.H. Graveson et al. eds., 1982), that the German advantage in civil procedure is at its greatest in the Small Case, where the costliness of adversary fact-gathering is intolerable. See also Jolowicz, *supra* note 78, at 270 (cited by Kötz, predicting that the Anglo-American systems will experience “an abandonment of the adversary process, even if only for small claims”). For cogent evidence of the judicial hand in small claims litigation, see Galanter, Palen & Thomas, *The Crusading Judge: Judicial Activism in Trial Courts*, 52 S. CAL. L. REV. 699, 706–08 (1979).

A full account of the decline of adversary fact-gathering in the real practice of modern American dispute resolution would also give due attention to the rise of administrative decision-making. See, e.g., Jerry L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983), describing one corner of the field:

There are perhaps 5,600 state agency personnel (supported by 5,000 more) whose sole function is to adjudicate disability claims. Over 625 federal

administrative law judges hear administrative appeals from state agency denials. This total of more than 6,000 adjudicators approaches the size of the combined judicial systems of the state and federal governments of the United States. And the claims that these officials adjudicate are not small. The average, present, discounted value of the stream of income from a successful disability application is over \$30,000. Disability claims, on the average, thus have a value three times that required by statute for the pursuit of many civil actions in federal district courts.

*Id.* at 18.

**139.** MANUAL, *supra* note 5, § 2.711, relying upon FED. R. EVID. 1006, notices the possibility of using summary rather than verbatim testimony for “[v]oluminous or complicated data.” On the parallel to German techniques of recording and consulting testimony, see *supra* text accompanying notes 15–18.

**140.** Kaplan, *supra* note 78, at 841.

**141.** Von Mehren, *supra* note 4.

to displace the trial, a phenomenon long evident in American criminal procedure,<sup>142</sup> is now increasingly manifest in civil procedure as well. Between discontinuous trial in the Continental tradition and our system of discontinuous pretrial proceedings followed by concentrated trial, the difference need not be all that great, especially since so few of our cases actually go to trial. Although ostensibly conducted in preparation for the concentrated trial, managerial judging in its more important aspects is directed toward suppressing the trial. Managerial judging succeeds best when pre-trial clarification produces settlement, capitulation, or dismissal.

Even when civil cases do advance to trial in our system, much of what has made the trial so consequential is the latitude for adversary distortion in the fact-adducing process. Accordingly, I incline to point to a different “grand discriminant” between the two legal cultures – not concentration, but adversarial versus judicial responsibility for gathering and presenting the facts. If our concentrated trial occurred after nonadversarial fact-gathering in the pretrial process, our trial might ultimately resemble somewhat the current German review-de-novo proceeding for first appeals.<sup>143</sup> At trial the court would recall and examine key witnesses afresh, while facts not in serious controversy would be elicited from the pretrial dossier.

*The Jury.* “The common law system,” writes von Mehren, “had to concentrate trials because of the jury ... The presence of a jury makes a discontinuous trial impractical.”<sup>144</sup> Historically, it is surely correct that concentration of the trial eliminated the problems of reassembling and controlling groups of laymen across long intervals, problems that would otherwise have bedeviled a system of routine but discontinuous jury trial. “Moreover, at least until relatively modern times, there was probably no way in which material presented at widely separate points in time could have been preserved in a form that would have enabled the jury to refresh its recollection when it ultimately came to deliberate and render the verdict.”<sup>145</sup> In an age of stenographically reported and now videotaped testimony, however, those concerns look less fundamental.<sup>146</sup>

Although civil jury trial is a comparative rarity within the declining subset of our cases that go to any kind of trial,<sup>147</sup> the jury entitlement is enshrined in the seventh amendment and in comparable state

**142.** I have discussed the origins and the shortcomings of our nontrial plea bargaining procedure in Langbein, *Understanding the Short History of Plea Bargaining*, 13 L. & Soc’y REV. 261 (1979), and Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978).

**143.** See *supra* text at note 116. Note further that developments in German procedure have also been undermining the contrast between concentrated and discontinuous trial. Regarding the German effort to limit discontinuity, see *supra* note 9; see also von Mehren, *supra* note 4, at 370–71.

**144.** Von Mehren, *supra* note 4, at 364 (note omitted).

**145.** *Id.* at 364–65.

**146.** See, e.g., M. FRANKEL, *supra* note 36, at 109–14, discussing the Ohio experiment in which judicially edited videotaped evidence is replayed for the trial jury. Frankel observes the potential for this technique to help liberate us from the concentration requirement, and thus to bring us closer to Continental civil procedure. *Id.* at 113–14.

**147.** Two decades ago Kenneth Culp Davis gathered data indicating that “[f]ive out of six trials in courts of general

constitutional guarantees. There is a substantial body of opinion that the civil jury is a worthwhile safeguard, and that view can scarcely be gainsaid as long as our trial bench remains, at the margin, so unreliable.

The question arises, therefore, whether the jury guarantee will continue to dominate our increasingly juryless practice. In the context of comparative civil procedure, the question is whether the jury tradition that underlies the Anglo-American concentrated trial is a true "grand discriminant," capable of preventing convergence toward Continental procedure. An initial cause for doubt is that the Anglo-American tradition has been for half a century decisively sundered in the matter of the jury entitlement. The English effectively abolished civil jury trial in 1933.<sup>148</sup> Paradoxically, however, theirs is the more faithful adherence to the tradition of the concentrated trial, because their pretrial process is less developed. What has continued to unite English and American civil procedure, therefore, is adversary domination of fact-gathering.<sup>149</sup>

But must the American jury entitlement ultimately defeat convergence toward the German model? In other words, is judicial responsibility for fact-gathering incompatible with lay adjudication? We have little direct experience, since European legal systems do not share our preoccupation with the jury in civil procedure. The Germans employ juror-like lay judges for first-instance proceedings in various of the specialized courts (labor, social, commercial, administrative, tax) and in the courts that handle cases of serious crime.<sup>150</sup> The lay judging system combines lay and professional judges in a single panel (a "mixed court") that deliberates and decides together. I have elsewhere had occasion to describe the German mixed court, and to contrast it with our jury court in the realm of criminal procedure.<sup>151</sup> I came to the conclusion that while each form of court structure has advantages, the two are broadly comparable in serving the main purposes of the jury guarantee.<sup>152</sup> Elsewhere in Europe, true jury courts have been incorporated into criminal procedural systems that retain strongly nonadversarial pretrial

jurisdiction are without juries." Davis, *An Approach to Rules of Evidence for Nonjury Cases*, 50 A.B.A. J. 723, 723 (1964).

**148.** ADMINISTRATION OF JUSTICE (MISCELLANEOUS PROVISIONS) ACT, 1933, 23 & 24 Geo. 5, ch. 49, § 6. See *Ward v. James*, [1966] 1 Q.B. 273, 279–303, for discussion of the minute residual sphere of civil jury trial in England.

**149.** At least for the present, the Americans do not find English companions on the early steps of the path of convergence toward German-style judicial responsibility for fact-gathering. The predicate is lacking – the English have not followed us into managerial judging. The English have restricted in a variety of ways the growth of complex multi-party litigation, the phenomenon that gave rise to American managerial judging. English substantive

law is narrower, their pretrial system is primitive, their multi-party practice is less permissive, and their loser-pays cost-shifting rules deter adventurous litigation. See R. Prichard, *A Systemic Approach to Comparative Law: The Effect of Cost, Fee, and Financing Rules on the Development of the Substantive Law*, J. LEGAL STUD. (forthcoming); Jolowicz, *supra* note 78, at 226–57, especially 242–44.

**150.** See generally EKKEHARD KLAUSA, EHRENAMTLICHE RICHTER: IHRE AUSWAHL UND FUNKTION, EMPIRISCH UNTERSUCHT (1972).

**151.** Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?* 1981 AM. B. FOUND. RESEARCH J. 195.

**152.** *Id.* at 215–19.

processes.<sup>153</sup> Key witnesses who have been examined in the officialized pretrial are simply recalled for the jury. Accordingly, the indications are that judicial conduct of fact-gathering could be smoothly integrated into the jury tradition.

*Abridging Adversary Theory.* It is curious that managerial judging took hold so easily in a legal system supposedly governed by the counter-principle of judicial inactivity.<sup>154</sup> Because managerial judging imposes such major limits on partisan autonomy in fact-gathering, it is in principle irreconcilable with that branch of adversary theory that purports to justify adversary fact-gathering.

Regardless of where managerial judging is headed for the future, it has already routed adversary theory. I take that as further support for the view advanced in Part V that adversary theory was misapplied to fact-gathering in the first place. Nothing but inertia and vested interests justify the waste and distortion of adversary fact-gathering. The success of German civil procedure stands as an enduring reproach to those who say that we must continue to suffer adversary tricksters in the proof of fact.

## 2. France

**Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir, trans., 3rd edn., 1998), 119–31**

### I

Just as the French Code civil has served as a model for the private law of many countries of the Romanistic legal family, so has the French *system of courts*. We shall concentrate here on the *Court of Cassation*, the highest French court in civil and criminal matters, which deserves special attention, since it differs in characteristic respects from the comparable supreme courts of the Anglo-American and German legal families.

The Court of Cassation was created by the legislation of the French Revolution. Under its original title “Tribunal de Cassation,” its first function was to assist the legislature rather than to act as a court: its task was to see that the courts did not deviate from the text of the laws and so encroach on the powers of the legislature. In those days even the *construction* of a statute ranked as a “deviation” from its text, as did the judicial completion of an incomplete law. This was because the provincial courts of the *ancien régime* – the “Parlements” – had often used the device of construction to evade or restrict the reforming laws of the king. Furthermore it seemed to conflict with the principle of separation of powers for the judges to be empowered to construe statutes; so courts were allowed to refer doubtful questions of construction to the legislature – the “référé

**153.** See GERHARD CASPER & HANS ZEISEL, *DER LAIENRICHTER IM STRAFPROZESS* 9–10 (1979).

**154.** See Miller, *supra* note 133, at 21–22, for some interesting conjectures on why the bar has not resisted the rise of

managerial judging. For the cheering endorsement of the American College of Trial Lawyers, see AMERICAN COLLEGE OF TRIAL LAWYERS, *RECOMMENDATIONS ON MAJOR ISSUES AFFECTING COMPLEX LITIGATION* (1981).

facultatif.” The fact that the Tribunal de Cassation was originally outside the courts system proper had two consequences: first, it could only quash (“casser”) the decisions of the courts, not substitute its own decision on the merits; secondly, the courts were not bound by the decisions of the Tribunal de Cassation, but could decide the matter on remand exactly as they had done the first time; if this second decision was questioned, the Tribunal de Cassation was bound to lay the question in dispute before the legislature for final solution – the “référé obligatoire.”

The revolutionary distrust of judicial legal development in all its forms evaporated fairly quickly; the courts never used the “référé facultatif,” and the text of the Civil Code itself recognizes the need for judicial interpretation . . . so the Tribunal de Cassation, which NAPOLEON renamed the “Cour de Cassation,” itself gradually took over the task of construing the statute and of quashing the judgments of lower courts which had misconstrued it. The principle still remains, however, that the Court of Cassation cannot itself render a decision on the merits, but can only quash the decision under attack and remit the matter for rehearing to another court of the same level. Even today that court is not bound to follow the view of the Court of Cassation: if it refuses to do so and this second judgment is brought to the Court of Cassation, the combined chambers of the court of Cassation decide the matter. If the second decision is quashed, the matter is remitted to a third court, which is then bound to follow the view of the law laid down by the Court of Cassation.

In *Italy* this rather cumbrous procedure is simplified. There also the Corte di Cassazione may only quash the decision under attack, but the court to which the matter is remanded is thereupon bound to follow the view of the law laid down by the Court of Cassation; see art. 384, par. 1 Codice di procedura civile.

It should be noticed that in principle every decision of a French court is liable to attack before the Court of Cassation, provided that other remedies are unavailable or have been exhausted. Thus decisions which are unappealable, because of their low monetary value, for example, may be taken to the Court of Cassation which may therefore have to review the decision of a *tribunal d'instance*. If the preconditions are satisfied the Cour de Cassation is *obliged* to render a decision: it has no power to select cases of special significance. In consequence the Court is grossly overworked, delivering about 18,000 decisions on applications for review every year in civil matters alone.

In *Italy* the right to have judicial decisions reviewed by the Court of Cassation is laid down in the *Constitution* of 1948: see art. 111. It is true that the Codice di procedura civile of 1942 denies review to judgments of *juges de paix* which are not subject to appeal (art. 360), but art. 111 of the Constitution, as construed by the courts, permits review by the Court of Cassation even in these cases; see Cass. 9 Feb. 1962, n. 271, Giust. Civ. Rep. 1962, s. v. “Cassazione civile” n. 163.

In principle the Court of Cassation only answers *questions of law*; *questions of fact* are left to the “uncontrolled judgement of the judges of



fact" (*appreciation souveraine des juges de fait*). Of course the distinction between questions of law and questions of fact is notoriously difficult, so the Court of Cassation can very often determine the extent of its activities. The principal factor it considers is whether any decision it makes will be of general significance and so help to maintain uniformity in the courts. Contrariwise, the Court of Cassation adopts a position of restraint when it appears that a legal development is still in full flood; in such a case it often leaves the issue unresolved, saying that it is (ostensibly) a question of fact on which the trial judge has the final say.

For the French Court of Cassation, foreign law is in principle a question of fact; it therefore refuses to quash a judgment on the ground that foreign law has been wrongly applied, but it reserves the right to intervene in a case where the court below has wholly failed to apply foreign law as required by a rule of French conflicts law, or where a very gross error has been made in applying foreign law, or where it is a question of general significance (compare ZAJTAY, *Zur Stellung des ausländischen Rechts im französischen internationalen Privatrecht* (1963)). – The construction of contracts is also in principle a matter for the trial courts, but the Court of Cassation may intervene when general conditions of business or standard form contracts are being construed, or when the trial judge has “denatured” the contract by his construction, or has attributed to it a meaning inconsistent with the words of a clause “claire et précise” (see Ch. 30 II) – Art. 360 par. 5 Codice di procedura civile puts the Italian Court of Cassation in a similar position to indulge in covert appreciation of questions of fact.

The French Court of Cassation has six chambers. Three chambers deal with litigation arising out of the general private law, a fourth deals with trade and economic law, the fifth with labour and social security matters, and the sixth with criminal law. Each civil chamber has at least fifteen judges, so that in the Court of Cassation as a whole there are about a hundred judges, in addition to about thirty-five “conseillers référendaires,” junior judges who do preparatory work on the cases for decision and take part in the decision-making process, though usually without a vote. A quorum of five judges is required in the civil and criminal chambers, in simple cases three. With such a large number of judges there is a risk that different benches may adopt different methods of judging cases, so when there may be contradictory decisions or when there is a “question de principe” to solve the President of the Court or the individual chambers can remit a decision to a “Chambre Mixte.” The “Chambre Mixte” is made up of judges from the chambers concerned in the matter in question, each chamber sending its President, its senior judge, and two other judges. Judges chosen in this way from *all* the chambers constitute the “Assemblée Plénière” (formerly the Chambres Réunies). Apart from ceremonial occasions, the Assemblée Plénière meets only when a decision is up for review a second time, because of the refusal of the lower court to which the matter was remanded after being quashed on the first occasion to adopt the view of the law enunciated by the Court of Cassation (see PERDRIAU, [“La Chambre Mixte et l’assemblée plénière de la Cour de cassation,” *JCP* 1994.

I.3798]). The Court of Cassation also has a special team of state attorneys, led by the Procureur Général, who co-operate not only in criminal matters, but in all civil matters as well; the French view is that at the level of the Court of Cassation the public, whom the state attorney represents, has an interest in the maintenance of law even in *civil* matters. In lower courts the participation of a state attorney in civil suits is necessary only in questions involving status and guardianship, though there is a right of intervention in all cases.

The content, structure, and phraseology of the decisions of the Court of Cassation, and to a lesser extent those of lower courts, are extremely characteristic of the particular style of French legal thought. From the external point of view every decision of a French court consists of a single sentence, which in the case of the Court of Cassation reads either “The court . . . dismisses [the demand for cassation]” or “The Court . . . quashes [the judgment under attack] and remits the matter to the Court of . . .” All the reasons for the judgment are to be found between the subject and predicate of this sentence, in the form of a string of subordinate clauses, all beginning with the formula “attendu que . . .” (“whereas . . .”). There is no particular section devoted to the facts of the case or the history of the litigation; indeed, the facts are referred to only so far as may be necessary to clarify the particular grounds on which cassation is urged (“moyens”), the reasoning of the lower court or the particular view of the Court of Cassation, and even then the reference may be very allusive. Furthermore, especially in the Court of Cassation, every effort is made to make the text of the judgment as dense and compact as possible. Subsidiary considerations are eschewed; and when the decision must be quashed on one ground, other grounds are not even considered. Asides, divagations, and efflorescences are never to be found in the Court of Cassation, and hardly ever below; nor are there references to the background of the case, legal history, legal policy, or comparative law. In a widely used guide to the style of judgments MIMIN wrote:

Extrajuridical arguments which do not assist in the solution of a case are among those which lend a merely sophisticated appearance to a decision. To invoke considerations of economics, sociology or diplomacy is to confuse different types of arguments and to conceal the correctness of sound reasoning [citation omitted].

Judgments of the Court of Cassation never contain references to previous decisions made by itself or any other court, or even references to legal writing; such references occasionally appear in the judgments of lower courts, but MIMIN regards them as objectionable even there [*Le style des jugements* (4th edn. 1978), pp. 473 ff.]. In consequence, decisions of the Court of Cassation are very rarely longer than 4–5 pages of typescript, and are often no more than a few lines long. They are generally marked by polished elegance, formal clarity, and stylistic refinement; often, however, they seem to be frozen in a pedantic ritual of empty formalism, inappropriate to the uniqueness of the concrete facts of life behind the case, which indeed can often only be guessed at. It is difficult to believe that these



decisions are the work of judges of flesh and blood who ever indulged in the luxury of doubt; it seems to be required by the "majesté de la loi" that a judgment should appear in perfect purity as the act of an anonymous body.

The style of judgments in the Cour de Cassation has been criticized by French writers as well as by foreigners (see DAWSON, *The Oracles of the Law* (1968) 375, 410 ff.; KÖTZ, *Über den Stil höchstrichterlicher Entscheidungen* (1973)). TOUFFAIT/TUNC ["Pour une motivation plus explicite des décisions de justice, notamment de celles de la Cour de Cassation," *Rev. trim. dr. civ.* 72 (1974) 487] have shown that because the judgments generally give only the decision and not the real reasons behind it, no dialogue between the Cour de Cassation and the legal public is possible and they make clear with a wealth of examples how trying it is for a French lawyer to have to venture a view on the possible scope of a terse and cryptic judgment without any expectation that the court will ever respond to what he says. They therefore propose that the Procrustean method of giving decisions in the form of "attendus" be abandoned and that the judges should be required "to give their reasoning, with an explanation why they decided in the way they did, and without concealing any of the relevant considerations." To similar effect is WITZ, *Rev. trim. dr. civ.* 91 (1992) 737. Needless to say, these proposals have had no effect so far; indeed, they have been roundly dismissed (see BRETON ["L'Arrêt de la Cour de Cassation," *Ann. Université des Sciences Sociales de Toulouse* 23 (1975) 5]).

Since the reforms of 1958 the French courts system below the level of the Court of Cassation is of the two-tier model familiar elsewhere in Continental Europe. Civil matters are decided at first instance by a single judge in the *tribunaux d'instance*, of which there are 471 in the whole of France, an average of 5 for each of the 90 departments. They can hear cases whose monetary value does not exceed 30,000 francs; their decision in litigation involving up to 13,000 francs is unappealable, though recourse to cassation is always possible. All other civil suits go first of all to one of the 180 *tribunaux de grande instance*, where three judges sit. Commercial cases, whatever their value, are first heard by *tribunaux de commerce* set up by governmental decree as required in the centers of commerce. At the moment there are about 230 of them. Three judges also sit on a *tribunal de commerce*, but instead of being career judges they are indirectly elected by the tradesmen of the jurisdictional area. Many of them, of course, have a basic knowledge of law, since in France legal education is nothing like as specialized as it is in Germany, and many educated laymen know some law. Labour disputes go first of all to the *conseil de prud'hommes*, which are also staffed by honorary lay judges. A bench is normally constituted by equal numbers of employers and workmen, but in the event of disagreement a judge with a casting vote is called from the *tribunal d'instance*. Special first instance tribunals exist for litigation arising out of tenancies, social security, and eminent domain.

Although, as we have seen, there are several special tribunals at first instance, alongside the general civil courts, on appeal the principle of

unified jurisdiction is observed; since the reforms of 1958 all appeals go to the *cours d'appel*, no matter whether the judgment in question was rendered by a *tribunal d'instance*, a *tribunal de grande instance*, or one of the special tribunals; the only exception is for some social security cases. If the sum in issue is less than 13,000 francs no appeal is possible, even in commercial or labour disputes. As there are only 35 courts of appeal this makes justice in France very centralized. Most of them serve two to four departments, though the court of appeal of Bastia hears appeals only from the department of Corsica. The Court of Appeal of Paris is especially important, for its catchment area includes nearly a fifth of the whole population of France; it has nearly 200 judges whose prestige, position, and pay are greater than those of the judges in the provinces. Courts of Appeal sit in chambers with three judges, which may specialize in particular areas of law, especially in the larger courts.

## II

Judges in France, like those in Italy and Germany, are *career judges*; they opt for a judicial career early in life, they are appointed by the state after passing the necessary examinations, and they are generally promoted to more important positions in higher courts on the basis of their performance and years of service. Here is RENÉ DAVID's picture of the career of the judge and the state attorney, both of whom in France are called "magistrats":

In France it is often family tradition or personal inclination which attracts people to the career of magistrat. In addition, it also appeals to some people who are not very ambitious, who prefer the security of a modest but assured salary to the risks of competition or the uncertainties of a life in business. A person who chooses to be a magistrat can count on a quiet life whose early years at any rate will be spent in a provincial town, and this life will not be troubled by undue responsibility: a judge in France sits alone only in very small cases, private or public; matters of any importance come before a tribunal with several members, whose decisions, in accordance with a principle of French law, are anonymous [Le Droit français I: Les Données fondamentales du droit français (1960) pp. 49 ff.].

In France lawyers of different branches follow different systems of training. Certainly future advocates, notaries, judges, and state attorneys must all follow the same four-year law course in a university, which leads to the "maîtrise en droit" once the university examination is passed. But then the paths diverge. The future "magistrat" has to pass a further, rather difficult examination conducted by the state, success in which gives him the right to attend the "École Nationale de la Magistrature" in Bordeaux. This school was founded in 1958 on the model of the famous "École Nationale d'Administration," and it admits about 200 young lawyers a year. They are sworn in as "auditeurs de justice" and are paid by the state during their period of training which lasts two and a half years. They spend time at

different courts and state attorney's offices, and receive intensive instruction to develop their specialist legal knowledge, including disciplines like forensic medicine, criminology, and business accounting. This period of training culminates in a further examination, and then the successful candidates, of whom for many years about 60 percent have been women, take up posts as judges and state attorneys; the range of choice available to them depends on their performance in the final examination.

French judges are guaranteed complete independence: they cannot be removed or even promoted against their will. The promotion of judges depends principally on the decision of a central committee on promotion, which contains prominent judges as well as officials of the Ministry of Justice and has before it the annual reports submitted by Presidents of Courts on the performance of the judges set under them. When judges are to be named to the Court of Cassation the Conseil supérieur de la Magistrature plays an important part; this is a committee of eminent judges whose members are chosen by the President of the Republic from a list prepared by the superior courts. This procedure more or less ensures that the political views of judges play no part in their promotion; if, on the other hand, men of a very independent cast of mind are not very likely to be promoted, this is not a fault of the French system in particular, but one which exists whenever the bridge between "inferior" and "superior" judges has to be crossed on the basis of a superior's evaluation of an inferior's performance in office.

In contrast to the judge in the Anglo-American legal system, the judge in France can hardly ever make a name for himself during his professional career. Only on trivial cases in the lowest courts does he sit alone; if he is one of a bench of judges, he is not permitted to deliver a dissenting opinion, and even if he writes the decision of the court the rigorous style of judgments in France requires him to repress all his personal characteristics. Yet this obviously reflects the internal attitude of French judges.

"Judges in France do not like to put themselves forward as creating rules of law. In practice, of course, they have to do so; it is not, and could not be, the function of a judge mechanically to apply well-known and predetermined rules. But judges in France make every effort to give the impression that this is how it is: in their decisions they keep claiming to be applying a statute; only rarely, if ever, do they put forward unwritten general principles or maxims of equity which might suggest to observers that judges were being creative or subjective" (DAVID, above, p. 50). In fact judges all over the world like to be seen as "applying" the law rather than as forming it, even interstitially, in a creative manner. MAX WEBER concluded that "the very judges who, objectively speaking, are the most 'creative' have felt themselves to be just the mouthpiece of legal rules, as merely interpreting and applying them, latent though they may be, rather than as creating them" (*Wirtschaft und Gesellschaft II* (4th edn., 1956) 512).

## III

Until recently the business of advising and representing parties in legal affairs, which has long been done in Germany by the unified profession of the *Rechtsanwalt*, was in France divided between *avocat*, *avoué*, and *conseil juridique*. Although the sole profession to survive the reforms of 1971 and 1990 is that of *avocat* we shall give a brief description of the different types of lawyer that used to exist, partly because traces of the distinctions remain and partly because the present rules would otherwise be incomprehensible.

(1) *Avocat* and *avoué*. For a long time a major distinction was drawn in France between the preparation of a case, essentially regarded as a ministerial matter, and the presentation of the facts and questions of law to the court, which was thought to be a task calling for special eloquence, grasp of doctrine, liberal education, and mental and professional distance from the minutiae of the proceedings. The former task fell to the *avoué*, the latter to the *avocat*.

The old-style *avocat* did all the oral pleading; the rest of the trial, the written part, fell to the *avoué*. The *avoué* did what was needed to get the court proceedings started, he drafted the statement of claim or the defence and any other documents, he saw to the distribution of the judgment, entered the appeal, supervised the execution, and so on. The task of the *avocat* was said to be *la plaidoirie*, while that of the *avoué* was *la procédure, l'écriture et la postulation*. The functions of *avocat* and *avoué* were mutually exclusive: neither could trespass on the prerogatives of the other. The *avocat* was a member of a liberal profession, the *avoué* an *officier ministériel*, holder of an office, as was evident from the fact that his fees, unlike those of the *avocat*, were fixed by an official tariff, not by negotiation with the client, and that the number of *avoués* admitted to any court was strictly limited.

The distinction between the functions of *postulation* and *plaidoirie* came under increasingly heavy criticism. The litigant could not see why he had to engage two professionals in even the simplest case. The duplication delayed the proceedings and rendered it more costly, since both were doing much the same work. The division of roles in the trial itself was also problematical, since assembling and presenting the facts in writing is not rationally separable from oral argument on the applicable legal rules. Indeed it often happened, especially in big cities, that the documents handed in to court were drafted by the *avocat* and simply signed by the *avoué* on his headed paper. For all these reasons the two professions were combined in 1971 in the "*nouvelle profession d'avocat*." Now it is only before the appellate courts that the prior division of labour obtains. In other courts all procedural steps are taken by the "*nouvel avocat*." Indeed it is only in the *tribunal de grande instance* and the higher courts that an attorney is required at all, for in other courts the parties may be represented by other persons. But in one respect the old distinction between *avocat* and *avoué* is retained in the *tribunal de grande instance*: although the *avocat* may plead before any *tribunal de grande instance* in France, he is like the *avoué* before him in being unable to take the purely procedural

steps in a lawsuit except in the court in whose area he has his chambers. Thus a person who wants a Paris attorney to represent him in litigation in Bordeaux has to retain an attorney with chambers in Bordeaux as well, so that he may do what was previously done by the *avoué*. It is different in the *tribunaux d'instance* and the commercial and labour courts, where the *avocat* may conduct the entire lawsuit irrespective of geographical considerations. The *avocat* may not appear before the Cour de Cassation or the Conseil d'État, where the representation of litigants is still entrusted to a special group of lawyers, who, like the former *avoués*, are *officiers ministériels* rather than independent professionals. So far as remuneration goes, the old distinction between "postulation" and "plaidoirie" has been maintained. For purely procedural steps the *avocat* receives payment in accordance with a fixed tariff (just like the former *avoué*), but he can negotiate the honorarium for advice and pleading with his client without reference to any tariff.

(2) *Avocat* and *conseil juridique*. Only an *avocat* may address a state court on behalf of a litigant, but until recently it was open to others to give legal advice. These other legal advisers, called "conseils juridiques," were in brisk competition with the *avocats* and won a good deal of work away from them; they concentrated on giving advice to businesses and were readier to meet the increasing demand for expertise in specialist areas of law as well as business management, tax matters, and international affairs. The *conseil juridique* had to be registered, just like the *avocat*, but all that was needed for this was a degree in law or business management. Foreigners thus qualified were automatically admitted to practice as *conseils juridiques*, though only to give advice on foreign and international law. This liberal attitude made Paris a veritable Mecca for foreign lawyers and law firms for twenty years or so, but the distinction between *avocat* and *conseil juridique* was at odds with the position elsewhere in Europe where only one kind of legal adviser was known, and decisions of the European Court of Justice on freedom of establishment and the provision of legal services made legislative intervention imperative. The Law of 31 December 1990 accordingly merged the professions of *avocat* and *conseil juridique* (for details see BÉNABENT ["Avocats: Premières vues sur la 'nouvelle profession'," *JCP* 1991.I. 3499]) and added to the twenty thousand or so *avocats* in France in 1990 approximately five thousand *conseils juridiques*. All these are members of one of the 180 chambers of advocates (*barreaux*) and practice as *avocats*, so that now for the first time in France no one may give legal advice for reward unless he has first been admitted as *avocat*.

(3) The two reforms have also made major changes in the professional life of lawyers. Traditionally the French *avocat* was a sole practitioner, a generalist able to deal with business of all kinds. Nowadays, however, thanks to economic and social developments in France as elsewhere, a client can only get proper advice from someone with specialist knowledge and expertise, which no attorney can possess in all areas of law at the same time. Furthermore, a modern attorney's office requires staff and equipment such as no sole practitioner could afford. There was thus an



increasing need for new forms of co-operation between attorneys. Laws of 1971 and 1990 therefore opened up a whole range of other forms of co-operation between lawyers. Various forms of office-sharing are possible, as well as legal partnerships of the kind known in Germany, and one can even incorporate a company of attorneys (*société civile professionnelle*). Such a company has independent legal personality, its own firm name, and its own capital, but the personal liability of the attorneys who are members of it remains unlimited.

Whereas Germany still clings to the ideal of the all-purpose lawyer (*Einheitsjurist*) and insists that all lawyers undergo the same training, whatever branch of the profession they propose to enter – a training far too prolonged, geared to training judges, and heavily regulated by the state – the system in France is like that in the rest of Europe. After spending four years studying law at University and gaining the *maîtrise*, a youngster planning to be an attorney or commercial lawyer will, if well advised, spend a further year acquiring specialist knowledge and taking the “Diplôme d’études supérieures” (DESS). If he still wants to become an attorney he must gain admittance to a “Centre national de formation professionnelle,” where he spends a year doing practical exercises and following courses given by professors, attorneys, and judges. On passing the final examination he will be awarded the “Certificate d’aptitude pour la profession d’avocat” (CAPA), and must then spend two years in the office of an *avocat* as an *avocat stagiaire*. During this period he is permitted to give legal advice and appear in court, and at the end of it he is qualified, without any further examination, to appear as *avocat* before any court in France other than the Conseil d’État and the Cour de Cassation.

#### IV

One may often throw some light on the characteristic style of a legal system by asking which *type of lawyer* it regards as representative. France and Germany are alike in not having developed the type of the wise judge which other people find so remarkable in the Anglo-American systems. But France and Germany differ, if we are right, in that in France the representative type of lawyer is the *avocat*, the lawyer who pleads before the courts, while the ideal German lawyer is the learned Doctor Iuris, the trained scholar who is to be found in all legal careers, especially among professors, but among judges and barristers as well.

In France the lawyer most often in the public eye is the *avocat* with his brilliant oratory and his special prestige. Although the traditional view that the *avocat* has no monetary contractual relationship with his client is virtually without significance today, the social prestige of the *avocat* still rests on the belief that when he appears in court he comes not so much as the agent of a particular party as in the exercise of a kind of public office. There are historical reasons for the high reputation of the *avocat*, for he is the representative of the self-confident French bourgeoisie which emerged triumphant from the Revolution of 1789. From that Revolution, like the July Revolution of 1830, the French lawyer learnt that one has to fight for the rights of the individual not in the study, but in the forum, on the floor of

Parliament, and in the halls of justice. This explains the public standing of the French *avocat* and his importance in French politics. For a long time one could justly say that the Parliament of France consisted half of mayors and half of advocates. Thus the revolutionary spirit of the French bourgeoisie has lived on in the advocate for two hundred years. It is true that like the French bourgeoisie, these advocates are by our standards today rather conservative, but theirs is a conservatism rooted in the belief that one should act with energy and commitment for the protection of freedom once won, for the maintenance of rights which have been earned, of “*droits acquis*.” The German lawyer, on the other hand, is typical of a bourgeoisie which is the product of revolutions which failed to succeed or failed to occur. While the impression of the French Revolution and the War of Liberation was fresh the German lawyer was still ready enough to leap on the barricades – consider the dispute between THIBAUT and SAVIGNY – but after 1848 he withdrew from public life like the rest of the bourgeois intelligentsia. At the time, towards the beginning of the nineteenth century, when the lawyers in France were constructing the noble edifice of administrative law – especially through the jurisprudence of the Conseil d’État – to protect the freedoms of the citizens against high-handed intervention by the state, the German lawyer was turning to the meditative cultivation of private law, supposed to be “unpolitical.” At the turn of the century in Germany lawyers who had theretofore abstained from public life and politics and had shut themselves up in the ivory tower of legal learning began to co-operate with the established powers; but this was the very time in France when the conscience of the nation was shocked by the Dreyfus affair. It is significant that ÉMILE ZOLA’s famous article in *L’Aurore* of 13 Jan. 1898 started with the words: “J’accuse . . .” and continued in the style of a prosecutor’s speech in court; this is a further indication of how the methods of thought and speech characteristic of the *avocat* are consciously used in France in the interests of maintaining the standards of law and morality in the public life of the nation.

One can also see marked differences when one asks which *legal virtues* are regarded as specially important in Germany and France. The ideal qualities of a German lawyer are expressed by ideas such as thoroughness, exactitude, learnedness, a strong tendency to tolerate academic disputes and the ability to construct concepts of law with which to master the variety of legal life. The French lawyer, especially the *avocat*, but also the judge, aims at clarity and brevity of expression, eloquence, style, effect, and form. This form is not something purely external, but structural in legal thought itself: “La forme donne l’être à la chose.” French lawyers have no time for pedantry, for the “querelles d’Allemand,” for the urge to be right in trivia irrelevant to the solution of actual problems. The German lawyer, on the other hand, willingly dons the cloak of learning and is eager to widen his knowledge. This is immediately obvious when one compares the style of judgments of German and French courts. The superior German court gives reasons which are wide-ranging and loaded with citations like a textbook, while the French Court of Cassation goes in for lapidary “whereas”-clauses. But the same conclusion follows from the characteristics of the legal



language in the two countries. STENDHAL may, according to tradition, have read the Code civil frequently in order to improve his style, but one could hardly advise a German novelist to attend to the Prussian General Land Law or the BGB. Indeed, one has the impression that in France there is very little room for a special legal language and that the French legal writer is the equal of the great masters of the French novel in writing in a manner which is clear and unpretentious and often brilliantly elegant. Germany, on the other hand, has developed a specialist legal language in which obscurity too often rates as profundity and which, even when it is not pure jargon, still makes it more difficult for the intelligent citizen to know what is going on in the law than is really desirable for public faith in its activities.

This also helps to explain why in France, unlike Germany, legal studies are part of a *general education*, why the Frenchman regards a basic legal knowledge – as RENÉ DAVID writes (above, p. 40) – as an “*élément presque normal de la culture générale*.” Many young people at French universities study law without having any intention of taking up a legal career: law is not just the object of a special training but an area in which one can learn to think clearly, to express oneself lucidly, and to practice oratorical skills. The other side of the coin is that the teaching of law in France is often a matter of rarefied principle, of not being occupied with the practical question of finding the right legal solution for the problems of social reality. But to study law in this general, unpractical, and rather “literary” manner is a way of furthering the education of young people who are not going to be lawyers. Therefore among educated Frenchmen one often meets with a certain familiarity with basic legal ideas. It may or may not be true, as one says, that the French peasant keeps a copy of the Code civil next to his Bible. But it does seem as if SOREL was right to say: “There is, so far as I know, no other country where the private law has entered so deeply into the customs of the country, and forms so intimate a part of its intellectual, emotional and literary life” (*Livre du Centenaire du Code Civil I* (1904) p. xxxv).

### 3. England

**Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir, trans., 3rd edn., 1998), 205–17**

#### I

Lawyers from other countries have long been fascinated by the institutions of English legal life and by the men who run them. This fascination has not always conduced to objectivity of judgment about English justice. The European who addresses himself to this theme often has in his mind's eye the romantic picture of a judge, robed in scarlet and heavily bewigged, holding court in a splendidly paneled hall and making law with wise authority from fat volumes of reports. People are especially surprised to be told that an industrial state like England with nearly 50 million inhabitants can get by with only a few dozen judges. One sometimes hears the

view that this tiny number of judges is explained by the fact that lawyers' fees and court fees are so exorbitant in England that law is only open to plutocrats, or the view that Bench and Bar conspire to preserve a legal system which has lots of old world charm but is seriously in need of reform, or the view that young English lawyers are trained exclusively in offices, on the theory that a university education in law is not only unnecessary but actually harmful. There may or may not be a grain of truth in these views but they certainly give a one-sided and false impression of English justice; in the following section we shall try to present a picture, necessarily only in outline, which is rather nearer the truth.

## II

The English citizen who is involved in civil litigation normally comes into contact not with the High Court in London, much less the Court of Appeal or the House of Lords, but with the Magistrates' Courts or the County Courts which are spread throughout the land.

(1) *Magistrates' courts* are staffed by "Justices of the Peace," magistrates without any legal training, three of whom constitute a bench under a chairman chosen by themselves. Only in the larger towns are there professional paid "stipendiary magistrates" who have legal training and who sit alone. Justices of the Peace, of whom at the moment there are about 30,000 in England, divided between about 1,000 courts, are nominally appointed by the Queen but really chosen by the Lord Chancellor from lists provided by local commissions. The choice is normally made from people who have shown some interest in public affairs by being active in local government, trades unions, professional organizations, chambers of commerce, or in some other way; but party political considerations also play some part in the selection of magistrates. To be a Justice of the Peace is not a full-time job and many of them are retired; it is an honorary position which attracts only a small payment for expenses. But the social prestige attaching to the position is considerable: persons of rank in provincial towns and even tycoons see it as an honour to be a Justice of the Peace and to be able to put the initial JP after their names.

The Jurisdiction of Magistrates' Courts is mainly in *criminal law*, where they deal with all minor offences, especially the vast number of traffic offences. Their procedure is summary, without a jury, and is very swift, especially since the defendant in trivial cases often pleads guilty and no evidence need be called.

For more serious crimes where a jury is called for, there is a special court, the Crown Court. Depending on the gravity of the charge, cases in the Crown Court are tried either before a full-time judge or before a "Recorder," an experienced barrister or solicitor in professional practice who is commissioned to serve as judge from time to time. The Crown Court may also contain up to four Justices of the Peace.

So far as *private law* is concerned, the jurisdiction of Magistrates' Courts is principally in matters of family law: they hear claims for maintenance between spouses and between parents and children, legitimate or illegitimate, issue separation orders, apply the laws about the care of

children, agree to adoptions, supervise guardians, and have extensive competence in matters concerning the protection of children.

Although for some time Justices of the Peace have been required on nomination to follow courses which introduce them to the most important legal questions likely to arise, it is nevertheless necessary to have a skilled lawyer constantly at their side to advise them. In the Magistrates' courts this function is performed by the so-called "clerk to the justices," a solicitor whose task it is, part-time or, in the larger towns, full-time, to supervise the administration of the court, to see to the procedure in court, and above all to advise the Justices when problems arise during a sitting. For this purpose the clerk may, should the justices so wish, take part in the deliberations prior to judgment.

(2) *County Courts* were introduced in England by statute "only" in 1846. The aim was to provide within easy reach of the parties courts which could determine private law disputes involving relatively low sums at rather small cost.

There are about 270 County Courts in England, so situated in the country that everyone is within easy distance of one. The courts are manned by a single judge, called "Circuit Judges." There are also "District Judges" in the County Courts who hear cases involving £5,000 or less in simple and informal proceedings. To these Circuit and District Judges, approximately 770 in number at present, must be added the "Recorders" who sometimes sit in the County Court; these are usually practising barristers charged by the Lord Chancellor to take on occasional judicial functions.

County Courts deal with civil matters involving £25,000 or less, and may hear cases involving larger sums, for cases of up to £50,000 are only heard by the High Court if they are particularly difficult or raise questions of special importance. In equity cases the County Courts' jurisdiction rises to £30,000. Furthermore, modern social legislation has reserved for the County Courts a whole series of very important matters, notably those arising from housing law and legislation protecting tenants. The practical importance of the County Courts is shown by the fact that about 85 percent of all civil actions are first heard in these courts: If we consider that from a social point of view the importance of a court is the number of *persons* whose affairs it deals with, there can be no doubt that County Courts are the most important civil courts in the country (JACKSON/SPENCER [*The Machinery of Justice in England*] (7th edn. 1989), p. 33]).

(3) When people abroad or even in England speak of English justice, they think in the first place of the *High Court of Justice* in London. This court consists today of three divisions: the Queen's Bench Division, the Chancery Division, and the Family Division. The number of High Court judges has risen from only 25 in 1925 to 97 at the present time, and it will probably increase still more. Each judge is attached to one of the three divisions mentioned. Today there are 63 in the Queen's Bench Division, presided over by the Lord Chief Justice, 15 in the Chancery Division under the Vice-Chancellor, and a further 19 in the Family Division under the

President. Except for appeals from judgments of lower courts and for some proceedings of an administrative nature, all cases in the High Court are decided by a single judge.

The division of business in the High Court allocates to the Queen's Bench Division the cases which before 1873 fell within the jurisdiction of the old Common Law courts. These include claims for damages for tort (mainly traffic or industrial accidents) and for breach of contract. The Queen's Bench Division has several specialized subdivisions, the "Commercial Court" which hears disputes between businessmen and enterprises in commercial matters, the "Admiralty Court," concerned with maritime collisions, maritime creditors' rights, cargo claims, and arrest of vessels, and the "Divisional Court," which applies administrative law. Judges in the *Chancery Division* hear cases affecting the administration of estates, bankruptcy, and the property of incapable persons, and resolve questions of trust law, company law, and intellectual property; accordingly that division has a strong equity flavour. Family matters are dealt with in the *Family Division*.

A number of important judicial tasks in the High Court are performed by the many "masters" and "registrars," who are chosen from barristers or solicitors with a certain professional experience. They perform many varied tasks (see DIAMOND, 76 *LQ Rev.* 504 (1960)) of which the main one is to work closely with parties and their legal advisers in the preliminary steps of procedure so that when the matter comes before the judge, it can be decided without delay in a single oral hearing. The master also decides, with appeal to a judge, whether the trial should be referred to a County Court, what security, if any, should be given, and questions regarding expert opinions and methods of proof. Furthermore, on proper motion of the parties, he sees to it that before the oral trial begins the parties provide their opponent with full information about the facts they propose to prove and the relevant documents in their possession. The master also tries to get the parties to agree as many facts as possible so as to reduce the amount that must be proved and thereby lighten the task of the judge. Because the trial is so carefully prepared and because the parties must fully disclose what positions they propose to adopt, many suits are terminated by compromise, admission or withdrawal of claim before the oral trial ever starts.

(4) The *Court of Appeal* hears appeals from judgments of the High Court, and, with some limitations, appeals from the County Courts as well. In theory the Lord Chancellor presides but in practice his role is performed by another judge, called the "Master of the Rolls" – a title borne since the seventeenth century by the Chancellor's senior subordinate in Chancery. In addition to the Master of the Rolls the Court of Appeal consists of 29 "Lord Justices of Appeal," who sit in divisions of three or occasionally two. The Court of Appeal reviews every point of law on which the judgment below was based but often feels itself bound by trial judge's findings of fact, even if they have legal consequences. Thus the Court of Appeal does not hear again the evidence presented at the trial and new evidence is admitted only within very strict limits.

(5) The *House of Lords* is the highest court, not only for England, but also for Scotland (except for criminal cases) and Northern Ireland, which in other respects have their own system of courts. Decisions are made by a special judicial committee which contains, apart from the present Lord Chancellor and predecessors who have demitted office on a change of government, ten judges who bear the title "Lord of Appeal in Ordinary," called "Law Lords" for short. The committee is normally composed of five judges and hears appeals from judgments of the Court of Appeal provided that, in view of the importance of the case, leave to appeal has been granted either by the Court of Appeal or by the House of Lords itself.

Brief mention must finally be made of the *Judicial Committee of the Privy Council*. The Privy Council is an advisory body which developed out of the old Curia Regis and the task of its judicial committee is to give the Queen advice, which is invariably followed, on petition made to her as the fount of justice by parties who have unsuccessfully exhausted the legal procedures in the national courts of Commonwealth countries. Appeal to the Privy Council has been abolished by many important members of the Commonwealth: Canada, India, Pakistan, and, in 1982, Australia have all declared that the decisions of their own highest courts are final. But even today it is not uncommon for the Privy Council to hear cases from countries as diverse as New Zealand, Sierra Leone, Bermuda, Gibraltar, and Mauritius, an impressive indication of the world-wide spread of the Common Law tradition.

(6) High Court judges are nominated by the Queen on the proposal of the Lord Chancellor who selects them from among barristers with at least ten years practical experience (the same pool as provides most Circuit and District judges); on appointment they receive the accolade of a knighthood. As a member of the government, the Lord Chancellor is a politician who has often spent many years in the House of Commons but it must be said that for the last fifty years at least political considerations have played next to no part in the nomination of judges. In the narrow and familiar circle of barristers a *communis opinio* readily determines which of their number are fit for judicial office and a Lord Chancellor would quickly incur public reproach or, worse still, public ridicule if he proposed for a judgeship a barrister who was politically committed but professionally incapable. Once appointed, judges are wholly independent. Under the formula of the Act of Settlement 1701, which is still in force today, a judge holds his office only "during good behaviour subject to a power of removal by His Majesty on an address presented to His Majesty by both Houses of Parliament," but no English judge has ever been removed from office since that date and no one in England is quite sure how exactly one would set about it (see JACKSON/SPENCER above, pp. 368 ff.). Even desire for promotion, which can temper the independence of judges on the Continent, plays no great role in England. High Court judges have already reached a peak position and for many of them a further move up to the Court of Appeal or the House of Lords would not be very attractive.



All judges, even Circuit Judges, are chosen from among the group of successful and well-regarded barristers ... This ensures that the higher courts are manned by judges who are extremely competent and very experienced in practice, able to command the respect of the whole legal profession. But in the view of many people, this restricted principle of choice has the disadvantage that the English judges tend to be of an extremely conservative temperament: a person who has enjoyed a brilliant professional career will hardly be disposed to criticize and reform the very circumstances which made it possible. This tendency to stability may also be reinforced by the fact that a judge is never appointed before he is 40, and usually not until he is past 50; he retires at age 70. To be more specific, the charge has occasionally been made that the marked individualism of English judges led them, especially until the Second World War, to adopt a perverse attitude to modern social legislation and give an unduly restrictive construction to many of their provisions contrary to the clearly discernible will of Parliament (see JACKSON/SPENCER (above, pp. 377 ff.) and ABEL-SMITH/STEVENS [*In Search of Justice – Society and the Legal System*](1968), pp. 166 ff.).

Parliament itself has reacted to this. According to many writers, it was in a deliberate attempt to render modern statutes on social security, tax, agricultural holdings, and landlord and tenant “judge-proof” that Parliament referred disputes in these areas not to the ordinary courts but to special “tribunals,” of which there are now an enormous number; their procedure is relatively simple and cheap, they are often staffed by laymen, and they are often closely linked with relevant government departments. The number of appeals to the Court of Appeal in these areas is small and diminishing. This very fact helps us to understand how England gets by with so relatively small a number of judges, especially when one considers that Germany, for instance, has three levels of separate courts for administrative and social matters.

Whatever one may think of the conservatism of the English judges, it seems clear that England has never been readier for reform or more energetically critical of the existing system than today. Some radicals have demanded the “nationalization” of all professional lawyers, much as doctors were nationalized in the National Health Service, and would leave no part of the courts system untouched. In present circumstances these proposals may seem unrealistic but it must be granted that an increasing number of leading and influential jurists see the law of procedure and the courts system as in need of drastic reform (see JACOB, *The Fabric of English Justice* (1987) 246 ff., and in particular ZANDER, *A Matter of Justice, The Legal System in Ferment* (1989)). The process was started off by the Courts and Legal Services Act 1990, and further reforms are awaited. So far as the reform of substantive law is concerned, England and Scotland have each had a five-member “Law Commission” since 1965. They have a well-equipped staff to help them in their demanding task

to take and keep under review all the law ... with a view to its systematic development and reform, including in particular the

codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernization of the law (Law Commissions Act 1965 s. 3).

Many of the Law Commission's proposals have resulted in legislation which has modernized and improved English law on important topics. The Law Commission's programme of work originally contained a plan to codify the whole law of contract. This project has been abandoned. The advantages and disadvantages of the codification of English law are discussed in many recent articles of great interest to anyone from a Civil Law jurisdiction: see, for example, SCARMAN, *A Code of English Law?* (1966); HAHLÖ, "Here lies the Common Law: Rest in Peace," 30 *Mod. L. Rev.* 241 (1967); DIAMOND, "Codification of the Law of Contract," 31 *Mod. L. Rev.* 361 (1968); DONALD, "Codification in Common Law Systems," 47 *Austr. LJ* 160 (1973); KERR, "Law and Reform in Changing Times," 96 *LQ Rev.* 515 (1980); NORTH, "Problems of Codifications in a Common Law Country," *RabelsZ* 46 (1982) 94; ANTON, "Obstacles to Codification," 1982 *Jur. Rev.* 15. Also, from the point of view of a continents observer, KÖTZ, "Taking Civil Codes Less Seriously," 50 *Mod. L. Rev.* 1 (1987).

In recent years various aspects of the English legal system have repeatedly come under investigation by Committee and criticism by writers. It may be that London's importance as a legal center will diminish as the limits on the financial jurisdiction of the County Courts are raised and more criminal cases are heard by the Crown Courts. Noteworthy, too, are the English experiments with novel forms of "informal" resolution of minor disputes in private law. In non-litigious matters advice to the relatively deprived has been provided not only by solicitors but also, most successfully, by "Citizens Advice Bureaux." Such fascination as the English system of justice still exercises on the Continental observer depends now not so much on the admittedly astonishing position of the English judge as on the interesting question how in the years to come England will manage to effect a compromise between its tendency to cling tenaciously to traditional legal institutions and the need which exists in all modern societies to provide effective justice for every citizen.

### III

Professional lawyers in England are divided into *solicitors* and *barristers*. This distinction, which has cropped up several times in the preceding pages, is a further peculiar characteristic of English legal life which must now be briefly considered.

(1) The typical English *solicitor* is an independent lawyer who gives legal advice to a client on personal and business affairs. In practice on his own or in partnership with other solicitors, he carries through transactions involving land, drafts contracts and wills, undertakes the administration of estates, and advises his client on tax, commercial, insurance, and company law matters. Solicitors alone are empowered to take the necessary steps prior to trial. They may also act in the name of their client in the procedure which precedes the oral hearing before the judge. In the trial



itself they have a right of audience only in the Magistrates' Courts and the County Courts. Although solicitors have for years been campaigning against this restriction, which they regard as unjustified, the bitter resistance of the Bar saw to it that the door was opened only very slightly by the Courts and Legal Services Act 1990: the conditions attached to a solicitor's "right of audience" are so stringent that no significant change in practice is likely in the foreseeable future.

Most solicitors' offices are naturally not so much concerned in the preparation, initiation, or conduct of trials as with transactions concerning land. Registers of land exist in most areas of the country, but they are not as sophisticated as in Germany. If the title is not registered, the title of a vendor or mortgagor must be investigated carefully by any purchaser or mortgagee. Even if it is registered, most people who are buying and selling houses wish their interests to be protected from the contractual stage to the completion of the transaction. This business, called "conveyancing," falls mainly to solicitors (who had, indeed, a legal monopoly of it until very recently), and the fees for the conveyancing of houses constitute nearly half of the profession's income.

In 1989 there were about 60,000 registered solicitors in England. About 13,000 of these were employed by local authorities or in business. Of the 9,100 solicitors' firms about 80 percent have four partners or less, 14 percent have between five and ten, and the rest more than ten. There is normally one salaried assistant solicitor to every three partners, in large firms one to every two. In 1991 there were 6 firms with more than 500 solicitors.

The professional organization of solicitors is the *Law Society*, of which as many as 85 percent of all practicing solicitors are members. There is no legal requirement for a solicitor to be a member but the Law Society has statutory power to lay down rules, with the agreement of the Lord Chancellor and other leading judges, regarding the training and admission of solicitors. The Law Society also finances the Solicitors' Complaints Bureau which can bring disciplinary proceedings before the Solicitors' Disciplinary Tribunal, an independent judicial body. Solicitors' fees in private matters are normally a matter for agreement between solicitor and client. The courts, however, retain the power to review a solicitor's charges in any case involving court proceedings, and in other cases the Law Society will do so if a client complains.

(2) *Barristers* specialize in advocacy before the higher courts, essentially the preparation of written documents and the oral presentation before the court. Here barristers have a monopoly which rests not on the provisions of any statute but on a long-established practice of the judges according to which a party who does not appear *personally* can have no legal adviser in court other than a barrister. Barristers also give oral legal advice or written opinions and draft complicated wills, land contracts, or trust deeds; indeed, some barristers do nothing else. In these areas there is a certain competition

between barristers and large firms of solicitors, but it is quite normal for a solicitor in a case of particular difficulty to seek the opinion of a barrister, many of whom specialize in particular topics and therefore have an extremely detailed knowledge of the relevant judicial precedents. One very striking fact is that the etiquette of the Bar forbids any direct contact with the client. Thus a person who wishes to institute a suit in the High Court or to obtain a barrister's opinion must always do so through a solicitor. If a conference becomes necessary between the barrister and the client who is thus brought into contact with him, the barrister is bound by professional etiquette to hold his conference in the presence of the solicitor and in his own chambers, so far as possible. The choice of barrister normally falls to the solicitor since only a few litigants have any preferences, so it follows that a barrister's success depends very much on his links with the large firms of solicitors.

Even today barristers are not entitled to form partnerships. Instead, barristers occupy "sets of chambers" in loose groups of about twelve to fifteen, often specializing in particular areas of law. In London all these chambers are situated in the Inns of Court, in buildings possessed for centuries and steeped in tradition, not far from the High Court. The chief of staff in these sets of chambers is the *clerk*. The clerk makes the contact between solicitors and the barristers in his chambers, fixes appointments, gives information about the individual barrister's programme of work, and agrees with the solicitor on the fee payable to the barrister by the client. The amount of these fees is not fixed by statute but depends on the difficulty and importance of the case as well as the reputation and standing of the barrister in question. Since the clerk receives a fixed percentage of the fees paid to the barristers in his chambers, he is naturally interested in fixing the fee as high as possible, without losing the business to another set of chambers. Until recently it was regarded as unprofessional for barristers and solicitors to have *direct* transactions regarding fees without the clerk as intermediary, and this is still extremely unusual.

The method of fixing fees and the prohibition of partnership make it difficult for young barristers to make a living at the outset of their career, but the more they succeed in obtaining a certain reputation and in maintaining good contacts with firms of solicitors, the more sought-after they become and the higher the fees they can, through their clerk, prescribe. For barristers who are greatly in demand the burden of work can be very heavy, since advocacy can only be performed in person and the barrister is in principle obliged to accept every brief which is offered provided that the stipulated fee is paid. At a certain moment in a very successful career barristers will face the question whether they should not lighten their workload by petitioning the Lord Chancellor to submit their name to the Queen for nomination as *Queen's Counsel* (abbreviated QC). Queen's Counsel form the elite of the Bar from whom High Court and Circuit judges are normally

chosen. They stand in high regard in court and in the Inns, and are entitled to wear a robe of silk. For this reason, when a person has recently been promoted to the rank of Queen's Counsel, one says that "he has taken silk." Queen's Counsel can demand particularly high fees and normally appear in court in company with a "junior" barrister, for whom of course the party must pay an additional fee; in consequence of this great expense, Queen's Counsel are briefed only for important and interesting suits. No barrister may *claim* to be appointed Queen's Counsel; whether the Lord Chancellor accepts such a petition and proposes nomination to the Queen depends on whether the petitioner has, in practice at the Bar for at least ten years, achieved the requisite degree of success in his profession and renown among his peers. About one in ten of the 6,500 odd active barristers in 1990 were Queen's Counsel, and of these over 90 percent had chambers in London.

The professional organizations for barristers are the four *Inns of Court*, all of equal standing, known as "The Honourable Society of Lincoln's Inn," "of the Inner Temple," "of the Middle Temple" and "of Gray's Inn." The business of these four Inns is conducted by the so-called "benchers," not elected by the members of their Inn but co-opted for life by the other benchers. Most of them are now practicing barristers, mainly Queen's Counsel, but some are judges, for judges remain members of their Inn even after appointment.

In addition to running the business of their Inn of Court and administering its property, benchers admit students, who must become members of an Inn before their training, and call them to the Bar once they have completed it. Other institutions are of general importance for barristers. The most important of these is the *General Council of the Bar*. With members elected from the whole Bar, it represents the Bar's interests in public when threatened by legislation, the Law Society, and other organizations. It also lays down guidelines for professional conduct at the Bar. The training of future barristers is organized by the *Council of Legal Education* under the general direction of the Bar Council.

For details on the profession of the barrister and his position in the whole context of English legal life, reference may be made to the works of MEGARRY and ABEL-SMITH/STEVENS (above, p. 205). The former is written from the point of view of a successful Queen's Counsel and gives a clear and flowing account of the activities of English barristers and judges; it conveys the impression that everything is really all for the best in the state of justice in England, and that drastic reforms are unnecessary if not actually harmful. ABEL-SMITH/STEVENS, on the other hand, have done some empirical sociological research and raise the question whether the practice of law in England today is responsive to the demand of a modern society that it should be a "social service." The authors give a distinctly negative answer to this question and they do so with details which will give the foreign lawyer pause for thought, especially if he is unduly in love with English law. ZANDER (*Lawyers*

*and the Public Interest, A Study in Restrictive Practices* [1968], p. 212) sees the principal aim of the monopolies and professional duties of English barristers and solicitors, whether fixed by statute or tradition, as being to limit free competition in the production and distribution of legal services. The crucial question is whether these restrictive practices are justified as being in the public interest; the author thinks that by and large they are not

...

(3) The *training of lawyers* in England also has many features which will surprise the observer from abroad. The training is directed to the profession of *lawyer*, rather than of *judge* as in Germany. This is only natural because there is no such thing as a “judicial career” in England: one only becomes a judge after many years of successful practice as a barrister. Again, the bifurcation of the legal profession means that there are different methods of training and examination for solicitors and barristers. As one would expect from the historical development of the legal professions in England, these methods of training and examination are the responsibility of the respective professional organizations, the Law Society and the Bar Councils, not of the state or the universities. Of course it is possible to study law in almost all of the British universities and to emerge, normally after three years, as a Bachelor of Laws (Bachelor of Arts in Oxford and Cambridge). It is true that most of those admitted as barristers and solicitors possess a university degree in law, but this is not required, and indeed one can become a solicitor without being a graduate at all. The Inns of Court do require budding barristers to have a degree, but it need not be a degree in law. Many distinguished English judges took a degree in some other subject: LORD DIPLOCK read chemistry, LORD DENNING mathematics, and LORD WILBERFORCE classics before training to be a barrister – *after* leaving the university!

Today a distinction is drawn between the “academic” and “professional” stages of legal training. For most people the “academic” stage consists of three years study of law in a university. Those who graduate in some other discipline before opting for the Bar satisfy the academic stage by taking a one-year course prescribed and overseen by the professional bodies, leading to the Common Professional Examination.

At the “professional” stage the paths of future solicitors and barristers diverge. The future barrister spends a year at the Inns of Court Law School in London, and the future solicitor takes a comparable course elsewhere in London or in the provinces, the teaching and examining being done largely by judges and practitioners.

The examination passed, the future solicitor must spend two years under a “training contract” in a solicitors’ office. He is then admitted as a solicitor, but must still serve for three years as an assistant solicitor before he can practice on his own or as a partner in a firm of solicitors: in this way the public can be protected from lawyers of undue youth and inexperience.

The further training of a *barrister* is much the same. He must be entered as a "bar student" in one of the four Inns of Court and spend a year in barristers' chambers as a "pupil" gaining practical experience under the supervision of a pupil-master.

The bar student must also keep a specified number of "dining terms." "Dining terms," of which there are four per year, are periods of about three weeks during which bar students may take an evening meal in the Dining Hall of their Inn. One "keeps a dining term" by dining at least three times during it, and one must keep eight terms in this manner, that is, have dined on twenty-four occasions, before one may be admitted as a barrister. The explanation of this institution is that in the old days the communal dinner was an occasion for contact between barristers and youngsters, for conversations on legal matters and for moots. In our times this practice has largely lost its point, especially in view of the large numbers of students: "Today it is difficult to find any student who can see any value or utility in the ritual of dining in hall. The food, it is said, is poor or scanty or both, and the conversation does no more than pass the time; but the Inn requires it, and so one must go through the pointless ceremony" (MEGARRY [*The Lawyer and Litigant in England*] (1962), p. 114] ...).

After passing his exams the candidate is "called to the Bar" in a formal ceremony, and thereby becomes a barrister.

(4) Whether the division of the legal profession into two branches should be maintained is the subject of recurrent and lively debate in England. *In favour* of the split, it is said that to have barristers who specialize in advocacy is a great advantage for the parties and for the court: for the *parties* because the barrister is more detached from the case, can see it with fresh eyes, and has special experience in pleading, gained by constant practice; for the *court* because co-operation with lawyers can be made easier, more trusting, and free from fiction if judges have to deal with only a small circle of experienced specialists. *Against* the division of the legal professions one often hears the objection that it greatly increases the expense and duration of legal proceedings, since the same case is being worked on by two lawyers one after the other, and sometimes both together. One thing is sure, that it makes sense to have specialized competences within the legal profession, as, for example, for conveyancing or for the conduct of cases in court. What is in issue is only whether the kind and extent of such specialization should be fixed by compulsory rules as in England, or whether it should not be left, as on the continent and in the United States, to the free play of the forces of the market.

## B. CHINA

### 1. The Structure of the Court System

The Chinese court system follows a “four level, (at most) two trials” model. There are four levels of courts in China, namely: the basic courts at district or county level, the intermediary courts at the municipal level, the high courts at the provincial level and the Supreme People’s Court in Beijing.<sup>1</sup> Between 2015 and 2016, in order to reduce the heavy caseload of the Supreme People’s Court and to focus its resources on judicial policy making, six circuit tribunals of the court were established in six major cities: Shenzhen, Shenyang, Nanjing, Zhengzhou, Chongqing, and Xi’an. Each of these tribunals exercises the jurisdiction of the Supreme Court within their circuit. Reportedly, these circuits handled 12,000 cases in 2017, or 47 percent of the Supreme Court’s caseload.<sup>2</sup>

In each court, there are specialized divisions that hear cases within the general category of their specialty. Generally speaking, in any particular court there will be a civil division that hears civil cases that are not commercial, a second civil division that hear exclusively commercial cases, a division that hears criminal cases, a division that hears cases of a cross-border nature where at least one party is foreign. There is also an administrative law division that hears cases where private parties litigate against government agencies over their administrative decisions. Finally, there is a case initiation division that filters out frivolous or meritless litigation. It decides whether a case can be accepted by the court. In each division, there are a number of fixed collegial panels of judges. Within each court, there will be a president of the court, several vice presidents, chief judges and associate chief judges of the divisions, one head adjudicator and adjudicators in each panel. In addition, there are administrative organs within the courts that serve non-judicial functions. Judges are nominated by the president of a court and appointed by the Standing Committee of the People’s Congress at the corresponding level of the court.

Normally, a case is tried at a basic court at the first instance, and parties can appeal to the intermediate court – a court of second instance. A judgment becomes final after trial by the court of second instance. A case can be reopened through a process of adjudication supervision only in exceptional cases.<sup>3</sup> Such a motion can be initiated by the Supreme People’s Court, the president of a court, the procuratorate (the office of prosecutions), and the parties. It is usually based on errors in application of law and fact finding.<sup>4</sup>

Nevertheless, any court can be the appropriate trial court, depending on a number of factors, such as the subject matter, disputed amount and

1. Four cities enjoy a special status as a municipality under the direct administration of central government. Each of the four has its own high court. These cities are Beijing, Shanghai, Chongqing, and Tianjing.

2. See the SPC’s report to the NPC in March 2018.

3. 《民事诉讼法》第198条-第201条 [Law of Civil Procedure] arts. 198–201.

4. Ibid.



legal and social significance of the matter. For example, an intermediary court has original jurisdiction over cases that bear the maximum sentence of death or life imprisonment, over terrorism and national security cases, over criminal cases involving foreigners, and, foreign related civil cases that are deemed important.<sup>5</sup> Provincial high courts have the original jurisdiction over important cases at the provincial level.<sup>6</sup> The Supreme Court exercises the original jurisdiction over cases of national importance.<sup>7</sup> Jurisdiction over a civil or commercial matter can also be established by contract. For example, an international commercial dispute with a disputed amount of RMB 300 million yuan or above could be heard at the newly established international commercial tribunals of the Supreme People's Court if the parties by agreement nominate the Supreme Court's international commercial tribunal to hear disputes arising out of the transaction.<sup>8</sup>

## 2. The Role of Judges

### a. Managerial Judging

Contrary to the common law experience, but similar to what we have seen in *The German Advantage*,<sup>9</sup> Chinese judges assume a more active role in litigation and dominate the litigation process. Absent a jury system, judges are also active fact finders.<sup>10</sup> They host pre-trial conferences, supervise the exchange of evidence between the parties, decide what evidence needs to be gathered by the court, conduct investigation when necessary in civil cases, decide what evidence is to be examined at trial, determine the relevance, the authenticity, and the legality of evidence, and orally examine the witnesses at the trial. In such a system, the process of litigation is efficient, and its outcome is predictable. Also, without a lengthy and litigant-dominated discovery and deposition process, the cost of litigation is much lower than in the American system. However, when judges are the sole fact finders who also investigate and collect evidence, impartiality might be cast into doubt. Also, it is not unusual that judges already form opinions before the trial. Moreover, when judges become investigative judges, they often become the scapegoat for all the flaws in the judicial system. All complaints, frustration, and dissatisfaction in the litigation are directed at the judges.

### b. Service-Oriented Judging

So far as ideology is concerned, Chinese courts are people's courts serving the people. In 2003, then President and Chief Justice of the

5. 《法院组织法》第25条 [Organic Law of Courts] art. 25; 《刑事诉讼法》第20条 [Law of Criminal Procedure] art. 20; 《民事诉讼法》第18条 [Law of Civil Procedure] art. 18.

6. Law of Civil Procedure, art. 19.

7. Ibid. art. 20.

8. 《关于设立国际商事法院若干问题的规定》第2条 [Supreme People's Court Rules on

Issues Regarding the Establishment of International Commercial Tribunals] art. 2.

9. John H. Langbein, "The German Advantage in Civil Procedure," 52 *University of Chicago Law Review* (1985), 823.

10. The general public do participate in the trial process as people's assessors. One or two members of the collegial panel might be people's assessors.



Supreme People's Court, Xiao Yang, initiated a policy campaign of "adjudication for the people (司法为民)." Under this policy directive, courts felt compelled to provide easy access to people. That is normally done by having judges meet people at the reception areas of the courthouses where judges take questions and inquiries, and even provide legal advice to people coming to the court. In 2008, then Chief Justice, Wang Shenjun, initiated a new policy campaign called the "three supreme," which would require courts to take the general public's feelings into account in deciding cases. Such measures aim to make populist courts that connect with the general public.

As a result of this policy, it is the judiciary's duty to bring the administration of justice close to people by expediting adjudication and providing easy access to the legal system. As a result, judges are always evaluated by the number of cases they are able to conclude within a period of time. Also, strict time limitations are imposed that run from the day a case is accepted to the day the case is concluded. A time limit of six months is prescribed for a normal proceeding,<sup>11</sup> and three months for a summary proceeding.<sup>12</sup> The time limitation motivates judges to conclude cases as quickly as possible.

Judges are also encouraged to bring their services to people who can least afford the judicial procedure. They are encouraged to hold court sessions in open rural areas or, in recent years, to hold trials through video conferences to serve parties from different regions. In addition, judges regularly provide legal education seminars in schools and communities.

The direct consequence of an expedited and low cost judicial service is the abuse of the system. Virtually all Chinese courts are facing a flood of litigation, which requires judges to hold trials almost on a daily basis. Chinese judges shoulder a workload that is unimaginable in the West. Based on my personal experience and interviews with Chinese judges, on average, a judge at a basic level court tries over 200 cases to conclusion in a year. That will translate into more than one court opinion per working day. Appellate judges tend to carry a lighter caseload but deciding over 100 cases a year is not unusual. Quantity does not necessarily translate into quality and yet policy makers also want to ensure quality. An accountability system was adopted in recent years to hold judges accountable for errors in their judicial opinions. Nevertheless, to write quality court opinions is time consuming. It is difficult to imagine how quality of judicial decisions can be ensured when they are constantly rushed.

### **3. Judicial Independence**

#### **a. Collective Independence of the Courts**

The judicial independence exercised by Chinese courts is not the same as that in the West. In the West, independent exercise of adjudicative

11. Law of Civil Procedure, art. 149.

12. Ibid. art. 161.

power lies in the independence of individual judges. In China, judicial independence is exercised by a court “as a collective entity or organic whole vis-a-vis other state organs and outside pressures.”<sup>13</sup>

Within a court, the independence of collegial panels is often challenged by the decision of an adjudication committee or adjudicative committee (审判委员会). The adjudication committee consists of presidents and vice presidents of a court, heads of the divisions along with some senior expert judges. This committee has the power to decide cases, usually controversial, complex and high profile, based on a short oral presentation by the presiding judge without actually trying the case and looking at the evidence. The operation of the committee has been described in this way:

In a typical court, the adjudicative committee meets two or three times per month, each meeting lasting for half a day or a full day, and at each meeting 10 to 20 cases may be considered, so that the time devoted to each case is in fact very short. It has been suggested that although the majority view of the committee prevails in theory, in practice the opinion of the court president (who chairs the committee) will have the greatest weight.<sup>14</sup>

### **b. The Influence of a Higher Court**

Higher courts have the duty to guide the work of the lower courts within their jurisdiction. When facing a nuanced legal issue, for the fear of being overruled, a lower court may seek instructions from the next higher court. In the famous case of Qi Yuling the Shangdong Provincial High Court could not decide on whether harm to the constitutional right to education can be remedied in civil litigation. The issue was decided by the adjudication committee of the Supreme People’s Court. Following its decision, the Supreme People’s Court issued an official reply which stated: “Chen and others infringed Qi’s constitutional right to education through infringement of the right to one’s name, and caused severe harm. They shall be civilly liable.”<sup>15</sup> The high court ruled accordingly.

As it has been pointed out, such an interaction goes both ways. “[A] higher court may on its own initiative give instructions or guidelines to a lower court regarding a particular case before the latter.”<sup>16</sup> Such a practice has long been criticized for rendering the right to appeal nugatory.

### **c. The Political-Legal Committee**

The Chinese judiciary, as well as other arms of the government, operates under direction of the Communist Party Leadership. Under the

13. Albert H.Y. Chen, *An Introduction to the Legal System of the People’s Republic of China* (4th edn., Hong Kong, 2011).

14. Ibid. 187.

15. 法释〔2001〕25号 [Fa shi (2001) No. 25].

16. Chen, *Introduction*, 188.

Communist Party Central Committee, there is a central political-legal committee that manages all judicial organs at the national level. At local levels, there are provincial, municipal, district political-legal committees that lead judicial organs at the corresponding level. Such judicial organs include not only the courts, but also procurators (prosecutors), the public security organ (police) and state security organs, and the organs of judicial administration. As one can see, judiciary and law enforcement agencies such as police and prosecutors are united under the leadership of the political-legal committee, a party committee. The existence of such committee attaches a string to the autonomy of the court. In theory, the political-legal committee only exercises its leadership over policy and ideological issues and does not get involved in individual cases and the daily operation of the court. However, it has been noted that, in the past two decades, this committee has been exercising influence over the operation of judicial organs at the corresponding level, which includes the decision-making process in “major and difficult cases” and personnel appointments within the judiciary and prosecutors office.<sup>17</sup> Therefore, at the expense of separation of powers, to some extent, the political-legal committee has integrated the party, the government, and the judiciary into one entity.<sup>18</sup>

#### 4. The Emerging Case Law System

China follows a civilian tradition where codified law is the primary source of law with no established tradition of *stare decisis*. Formally, cases should never be cited in China, let alone be regarded as binding. In reality, my personal experience and discussions with judges tell a different story. The failure to cite cases does not mean that they are not read or that precedents are not followed, especially when rules are vague and legal issues are controversial.

Starting in 2011, a first batch of guiding cases were published by the Supreme People’s Court to “serve the function of guidance.”<sup>19</sup> According to the Supreme Court’s rules on guiding cases, lower courts shall “consider and compare the guiding cases when deciding a similar case.”<sup>20</sup> Publication of each guiding case requires meeting and a vote of the adjudication committee. According to the Supreme Court, guiding cases are selected because they have drawn social attention; the cases are typical; the rules applied in such cases are founded on principle; they involve controversial, complex and nuanced issues; or the cases provide guidance in some other way.<sup>21</sup> These published guiding cases are not mere reproductions of the original court opinions. They are written in the form of essays, which provide the basic facts, the results, and most importantly, the reasons for the decision. The end products, especially the reasons, were drafted by the Supreme People’s Court using language that did not come from the original cases, and represent the view of the Supreme Court and its adjudication

17. Jianfu Chen, *Chinese Law: Context and Transformation* (Leiden, 2008), 184.

18. Ibid. 183.

19. 法发 [2010]51号 [Fa Fa [2010] No. 51].

20. Ibid. art. 7.

21. Ibid. art. 2.

committee on a particular legal issue. According to an experienced judge, in practice, the extra analysis carries more weight than the case itself.

As of August, 2019, there have only been 112 guiding cases issued by the Supreme People's Court, which is not a sufficient number to provide guidance when the written law does not provide clear answers. However, important cases can also be found in other published sources.

Among the many published sources of cases by the Supreme People's Court, the most important one is the Gazette of Supreme People's Court. SPC Gazette started publishing cases in 1985 and are highly influential in practice. Gazette cases no longer require approval from the adjudication committee yet they still need approval from the heads of the corresponding division of the Court. Still, the Supreme People's Court made it clear that they are not bound by the Gazette cases though they may be bound by a guiding case. In a recent decision, the Supreme People's Court held that the petitioner's argument that the court shall follow a Gazette case is groundless because such a case is not a guiding case.<sup>22</sup>

Still, judges in practice not only look at guiding cases and Gazette cases but to others as well. Based on a seminar given by an experienced appellate court judge, courts, before making decisions, will check whether there is a similar case decided by the next higher court within the direct line of appeal for fear that an inconsistent decision will be overruled. They might also consider similar cases decided by courts at the same level although mostly for guidance.<sup>23</sup> Such a practice, in my opinion, does not differ much in principle from that of common law judges. Gaps in written law and the complexity of nuanced legal issues generated by a huge country like China inevitably make case law more relevant in legal practice.

## 5. Professionalism

Lack of professionalism has long been the most obvious obstacle to modernizing the Chinese judiciary. Higher education including legal education was suspended for nearly twenty years in China until 1978 when the college entrance exam and formal university education were restored. As a result, quite often, judges, lawyers, and prosecutors who have dominated the legal arena in the past decades had not received formal legal education or attended university before they were recruited to the court. Most judges received on the job training after they started working at a court, often as a clerk or legal secretary and moved up the rank to become a judge. The lack of professionalism was the very reason the adjudication committee was established in the courts so that expert senior judges could guide junior judges in deciding professionally difficult and socially important cases. Universities started to produce law graduates in the early 1980s and the professional judges then started to enter the judiciary.

22. (2014)民申字第441号 [(2014) Min Shen Zi No. 441].

City University of Hong Kong Law School on the case law system in China.

23. Based on statements made in a seminar given by Judge Zheng Jizhe at

In 1983, for the first time, the Organic Law of People's Courts required that judges must have professional legal knowledge.<sup>24</sup> The bar has been raised over the time. "In 1995–2001, the judiciary administered national qualifying examinations for intending judges. Since 2002, intending judges have to sit the same unified national judicial examination as intending prosecutors and lawyers."<sup>25</sup>

The Chinese judiciary continues to train judges within its system. It has been observed:<sup>26</sup>

The Chinese judiciary has recognised that continuing professional education of existing judges is an important task. This has been governed by the Regulations on the Training of Judges, and Plans for Education and Training in Court Cadres Nationwide have been made for 2001–2005 and 2006–2010 respectively. Since 1985, various educational institutions that specialise in judicial training have been established, including the National Judicial Cadres Part-time University, the Chinese Centre for the Training of Senior Judges and the National College for Judges. Judicial training is organised at both the national and provincial levels. As of the turn of the century, the great majority of Chinese judges obtained their law degrees or diplomas by adult education. The proportion of judges who held degrees increased from 7% in 1995 to 52% in 2004.

In 2001, the amended Law on Judges listed the minimum professional qualifications for a judge. He has to have a minimum of one to three years of legal experience after obtaining a bachelor's degree in law.<sup>27</sup> If one does not have a law degree, he can be appointed to be a judge if one has a bachelor's degree in other disciplines and has demonstrated possession of professional legal knowledge.<sup>28</sup> Work experience is not required, however, if one possesses a master or doctorate in law.<sup>29</sup>

Still, judges in China are not considered an elite professional class. The reason is partially because there are a large number of non-legal professionals who also carry the title of judge. They work in the courts as administrators, executive staff or judicial police. In 2013, a survey on the professional backgrounds of all thirty-one presidents and chief judges of high courts, in a mocking tone, revealed that only one judge passed the judicial examination (the equivalent of a bar exam), only eleven judges have law degrees; seven of them have neither attended college nor have a legal background.<sup>30</sup> Such a report reflected the public distrust of judiciary although a counter argument can easily be made that presidents of a court mostly act in the role of a court administrator and rarely have the time or interest to hear cases themselves. Therefore, a professional legal

24. 《人民法院组织法》[Organic Law of People's Courts] art. 34.

25. Chen, *Introduction*, 178.

26. *Ibid.* 205.

27. See 《法官法》[Law on Judges] art. 9.

28. *Ibid.*

29. *Ibid.*

30. 起底31 位省级高院院长 [revealing the profiles of thirty-one provincial high court presidents] (<http://news.takungpao.com/special/fyyz/> accessed May 2, 2020).

background is not a prerequisite for a job as president or chief judge of a provincial high court.

In a new round of judicial reform launched in 2014, a quota judge system was introduced for the very purpose of creating a professional class of judges independent of the ranks of bureaucratic civil servants.<sup>31</sup> Based on the new system, a fixed percentage of existing judges can become quota judges through a careful selection process; only quota judges can hear cases; they are considered independent professionals and not subject to the influence of officials who might be ranked higher in the civil servant system both in and out of the court system; and within the collegial panel, each judge is equal despite their ranks.<sup>32</sup> As mentioned earlier, quota judges are now held responsible for errors occurred in their decisions. As an incentive, judicial salaries will be significantly higher than those of civil servants of the same rank. In 2017, the first cohort of 120,000 judges were appointed as quota judges leaving more than 90,000 judges unqualified. The doors to the judiciary are now open to two classes of highly qualified candidates. The first class consists of prominent academics and lawyers. However, the prospect of attracting such high caliber candidates is not promising as only two academics and one practitioner entered the bench since 2013.<sup>33</sup> The second class consists of judicial assistants. Judicial assistants are a new creature in China modeled after the American federal clerkship system where elite law graduates are selected to become clerks for federal judges. While American federal clerkship only lasts one or two years and opens the door to elite law firms, the Chinese judicial assistants are also elite law graduates who sign up for the job with the hope of becoming a judge after a few years as an assistant. Such a practice is not yet established and, in 2017, only a few pilot areas have selected judicial assistants to become junior quota judges. Some informal data suggest that 160 out of 300 judicial assistants applying to become a quota judge were appointed to the bench in Shanghai and 197 out 400 in Guangdong.<sup>34</sup> By making the judiciary open exclusively to elite law graduates and expert judges, the quota judge system looks like a promising way of finally establishing a professional class of judges in China.

31. 徐家新, “推进司法人事改革, 加强队伍建设” [Interview with Xu Jiaxin, “Push Forward the Judicial Personnel Management Reform, Build a Stronger Cadre”] ([www.court.gov.cn/shenpan-xiangqing-85662.html](http://www.court.gov.cn/shenpan-xiangqing-85662.html) accessed May 2, 2020).

32. Ibid.

33. Ibid.

34. Internal data provided to the author by two current judicial assistants.





# **COMPARATIVE PRIVATE LAW**



# PART ONE

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## THE LAW OF OBLIGATIONS

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### CONTRACT LAW

#### I. THE STRUCTURE OF CONTRACT LAW

##### 1. Civil Law

The Romans did not explain contract formation by abstract principles. As has often been said, they had a law of particular contracts, not a general law of contract.<sup>1</sup> The rules that governed when a contract was formed depended on the kind of contract the parties had made.

Some contracts were formed by the consent of the parties alone. They came to be called contracts *consensu* or consensual contracts. They included sale, lease, partnership, and mandate (*mandatum*) which was a gratuitous agency.<sup>2</sup>

Others became binding on delivery of the object with which the contract is concerned. They came to be called contracts *re* which literally means “thing contracts.” (Since that sounds odd, they are sometimes called “real contracts” even though that sounds odd, too.) They included a gratuitous loan of an object for use (*commodatum*) or consumption (*mutuum*). In a gratuitous loan for use, the borrower had to return the same object he was lent: for example, he borrowed a horse and had to return the very same horse. In a gratuitous loan for consumption, the borrower had to return as much of the same kind and quality as he had borrowed but not the very same objects: for example, he borrowed money or wine and had to give the same amount back. The contracts *re* also included pledge (*pignus*) and the deposit of an object (*depositum*) with someone who would look after it gratuitously.<sup>3</sup>

Still other contracts became binding by completing a formality. The most general formality was *stipulatio*. Originally, the parties completed the formality by having the promisee formally ask the promisor a question

1. W.W. Buckland, Arnold McNair and F.H. Lawson, *Civil Law and Common Law* (1952), 265; Helmut Coing, *Europäisches Privatrecht* 1 (1985), 398; Alan Watson, *The Law of the Ancient Romans* (1970), 58.

2. Inst. 3.13.22–26.

3. Inst. 3.14.

which the promisor would formally answer. The promisee would say, “*Spondesne* such-and-such?” and the promisor would answer, “*Spondeo* such-and-such” (“Do you promise ...?” answered by “I do promise ...”). In time, it became customary to state in a document that a *stipulatio* had been made. According to Justinian’s legislation, such a document raised a presumption that could only be overcome by showing the parties had not been in the same town the day of its execution. The oral formality was thus replaced for practical purposes by a written formality. In medieval and early modern times, the accepted way to complete the formality, and the only safe way, was to go before a notary, who was not a person like the American notary public but a member of the legal profession.<sup>4</sup>

A gift above a certain amount required a special formality called *insinuatio*. The gift had to be registered with a court.

Contracts outside these recognized types came to be called “innominate” (nameless). Suppose the parties trade a horse for a mule. The contract is not a sale since money is not given in return. It is not a *stipulatio* since the parties did not make a formal question and answer. Originally, such a contract was unenforceable although, if one party performed, he could demand his performance back if the other party refused to perform. Later, provided that he had performed, he was given a choice: to demand back his own performance or to require the other party to perform. But he could not enforce the agreement if he had not performed. This rule was summarized by saying “*ex nudo pacto actio non oritur*”: no action arises on a bare agreement or “naked pact.”<sup>5</sup>

This system was preserved by the medieval jurists. It sounds complicated, but actually it may have functioned reasonably well. Parties to a sale or lease usually wish to lock in the advantage of a certain price or rent. A partner or an agent needs to know an agreement is binding so he can conduct business on the basis of it. But in other transactions, the parties’ need to bind themselves in advance is less clear. In any event, in Roman times, if they wished to be bound, they could easily make a *stipulatio*. The notarial formality in the Middle Ages was more cumbersome than the original oral question and answer.<sup>6</sup> But according to the fourteenth century jurist Bartolus, the unenforceability of innominate contracts had few practical consequences.<sup>7</sup> In the sixteenth century, Luis de Molina repeated Bartolus’ remark.<sup>8</sup> Presumably they meant that important transactions such as an exchange of parcels of land would be notarized anyway.

Nevertheless, the medieval jurists found the Roman distinctions among contracts puzzling. The medieval canon lawyers recognized that

4. Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990), 547.

5. See generally, W.W. Buckland, *Manual of Roman Private Law* (1953), 247–71; Max Kaser, *Das Römische Privatrecht* (1971), 534–7.

6. Zimmermann argues that because of its technical requirements, even the written

formality of Justinian required the help of professionals: the *tabelliones*. Hence the need to extend the range of enforceable contracts. Zimmermann, *Law of Obligations*, 547–8.

7. Bartolus de Saxoferrato, *Commentaria Corpus Iuris Civilis in Omnia quae extant opera* (1577), to C. 4.6.2.

8. Ludovicus Molina, *De iustitia et iure tractatus* (1614), disp. 255.

breaking a promise was wrongful. They allowed the promisee an action on a broken promise before a canon law court.<sup>9</sup> The civil lawyers did not disagree in principle. By conflating a Roman text that said all contracts require consent<sup>10</sup> with others that spoke of a *ius gentium* (a law “established among all men by natural reason”),<sup>11</sup> they concluded that consent to any contract creates an obligation under the *ius gentium* although not one that the civil law would enforce.<sup>12</sup> Thus, the medieval civilians found themselves denying that all promises were legally enforceable while agreeing with the canonists that promises should be kept,<sup>13</sup> just as the ancient Romans themselves refused to enforce all promises even though they placed a high moral value on promise-keeping.

Still, it seemed odd to them that not all promises were legally enforceable. In the late thirteenth century, Hostiensis quipped that the point of the Roman distinctions among contracts was to fill law books until scholars grew tired of spending money uselessly.<sup>14</sup> His contemporary Jacobus de Ravanis said:

If I agree that you give me ten for my horse there is an action on the agreement. But if I agree that you give me your ass for my horse there is no action on the agreement. If a layman were to ask the reason for the difference it could not be given for it is merely positive law. And if you ask why the law was so established, the reason can be said to be that the contract of sale is more frequent than that of barter.<sup>15</sup>

Bartolus and Baldus tried to find a better reason although the one they found would not seem persuasive to us. They said that the contracts such as sale which are binding by consent take their “name” from an act the party performs by agreeing. I can sell you my house today by so agreeing even if I do not put you in possession until next month. Contracts such as deposit are not binding on consent because they take their name from an act a party performs by delivering. I cannot say I am depositing an object with you unless I am actually depositing it right now.<sup>16</sup> Baldus not only accepted this explanation but concluded that innominate contracts were unenforceable even in canon law.<sup>17</sup> This strange explanation may have

9. Jules Roussier, *Le Fondement de l'obligation contractuelle dans le droit classique de l'église* (Paris, 1933), 20–94, 177–216.

10. Dig. 2.14.1.3.

11. Inst. 1.2.1; Dig. 1.1.9.

12. E.g., Accursius, *Glossa Ordinaria* (1581), to I.3.4 pr. to necessitate; Iacobus de Ravanis, *Super Institutionibus Commentaria* (published under the name of Bartolus de Saxoferrato in *Omnia quae extant opera* (1615), to I.3.14.1 nos. 3, 9) (on the authorship see Eduard Meijers, *Etudes d'histoire du droit*, III, *Le droit romain au moyen âge* (1959), 68–9); Petrus de Bellapertica, *Lectura Institutionum* (1536), to I.1.2.1 nos. 30–1.

13. Guido Astuti, “I principii fondamentali dei contratti nella storia del diritto italiano,”

*Annali di storia del diritto* 1 (1957), 13–42, 34–7.

14. Hostiensis, *Summa* to X. 1.25 no. 3 (1537), (“Quae sunt divisiones pactorum ut quid mebranes occupabit: nisi ut scholares expensis inutilis fatigent.”).

15. Iacobus de Ravanis, *Lectura Super Codice* (published under the name of Petrus de Bellapertica, 1519), to C. 4.64.3 (photographic reproduction, *Opera Iuridica Rariora* 1, 1967) (on the authorship, see Meijers, *Etudes*, 72–7).

16. Bartolus, *Commentaria* to Dig. 2.14.7 no. 2.

17. Baldus de Ubalis, *Commentaria Corpus Iuris Civilis* to C. 2.3.27.

seemed persuasive to Bartolus and Baldus because it was coaxed out of the word “name” which appeared in their Roman texts. Their usual method was to explain Roman texts in terms of other Roman texts rather than to look for theoretical or philosophical explanations.

From the sixteenth to the eighteenth century, as jurists took a more philosophical approach to law, the Roman system ceased to command respect and was eventually abolished. As with torts, the starting point for the late scholastics of the sixteenth and early seventeenth century was the philosophy of Aristotle. He had described transactions such as sale and lease as acts of “voluntary commutative justice.” The parties exchanged resources voluntarily. Commutative justice required that the value of what each party gave equaled that of what he received. In contrast, in acts of “involuntary commutative justice” one party took or injured another’s resources. Equality was restored by requiring him to pay their value.<sup>18</sup> In another passage in the *Ethics*, Aristotle discussed the virtue of “liberality”: the liberal person disposed of his money wisely, giving “to the right people the right amounts and at the right time.”<sup>19</sup> Thomas Aquinas put these ideas together: when one person transferred a thing to another, either it was an act of commutative justice that required an equivalent or it was an act of liberality. The late scholastics concluded that a party might enter voluntarily into either of two basic types of arrangements, a gratuitous contract in which he enriched the other party at his own expense, or an onerous contract in which he exchanged his own performance for one of equivalent value. Following them, Grotius and Pufendorf, the seventeenth-century founders of the northern natural law school, developed elaborate schemes of classification to show how the contracts familiar in Roman law can be fitted into these two grand categories.<sup>20</sup> The French jurists Domat and Pothier explained that these are the two *causes* or reasons for making a binding promise.<sup>21</sup>

For these jurists, this classification meant more than the tautology that a party either does or does not receive back something in return for what he gives. In a gratuitous contract, the donor must actually intend to benefit the other party, and if he does not, the contract is not a gratuitous contract whatever the document to which the parties subscribed may say.<sup>22</sup> In an onerous contract, a party must receive not simply a counter-performance, but one of equivalent value. These jurists thought that the rules that govern the parties’ obligations should depend on which sort of

18. Aristotle, *Nicomachean Ethics* V.iv 1130<sup>b</sup>.

19. Thomas Aquinas, *Summa theologiae* at II–II, Q. 61, a. 3.

20. Hugo Grotius, *De iure belli ac pacis libri tres* (1646), II, xii, 1–7; Samuel Pufendorf, *De iure naturae ac gentium libri octo* (1688), V.ii.8–10.

21. Jean Domat, *Les Loix civiles dans leur ordre naturel* (2nd edn., 1713), liv. 1, tit. 1, § 1, nos. 5–6; § 5, no. 13; Robert Pothier, *Traité des obligations*, in *Oeuvres de Pothier* 2 (Bugnet, ed., 2nd edn., 1861), §

42. Actually, the first jurist to describe these two *causes* or *causae* was Baldus. It can be shown that he was drawing on Aristotle. James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991), 49–57.

22. Thus according to Grotius: “Nor is it enough for anyone to say that what the other party has promised more than equality is to be regarded as a gift. For such is not the intention of the contracting parties, and is not to be presumed so, except it appear.” Grotius, *De iure belli ac pacis* II. xii.11.1.

agreement they had entered into. The rules should ensure, so far as practicable, that in the case of an exchange, each party receives an equivalent, and in the case of a gratuitous contract, that the donor behaves sensibly.<sup>23</sup>

This classification cut across the Roman categories. Sale, lease, and mandate were all contracts *consensu* but the first two were onerous and the third was gratuitous. Mandate and gratuitous loan for use and for consumption are all gratuitous but the first is a contract *consensu* and the others are contracts *re*. Sale, lease, and barter are all onerous contracts but the first two are nominate contracts *consensu* and the third is innominate. Once the new classification was accepted, it seemed that the Roman categories were mere matters of Roman positive law.

The late scholastics consequently asked when, in principle, a contract should be enforceable. Aristotle and Aquinas had described promise-keeping as similar to truth-telling. One who keeps promises is faithful in deed as one who tells the truth is faithful in word.<sup>24</sup> But did it follow that, as a matter of justice, all promises should be enforced? In the case of a gratuitous promise, however faithless the promisor may have been, the disappointed promisee may be no poorer. Therefore, according to the sixteenth-century theologian and philosopher Cajetan, when the promise was gratuitous, the promisee could not demand that it be enforced as a matter of commutative justice. Nevertheless, if he had suffered damages by changing his position, then he could recover the amount of his damage.<sup>25</sup> A similar position was defended by the French jurist Connanus.<sup>26</sup>

Had this view prevailed, continental civil law might have antipated the American doctrine of promissory reliance. It was rejected, however, by Soto, Molina, and Lessius in the sixteenth century and by Grotius and Pufendorf in the seventeenth.<sup>27</sup> They pointed out that executory promises to exchange were binding even though no one had become poorer. Gifts were acts of liberality, but they could not be revoked after delivery. They concluded that, in principle, promises of gifts should be binding as long as the promisor intended to transfer a right to the object to the promisee.

They did not object, however, to the Roman requirement that one who promised to give away property must complete a formality. That was to ensure deliberation so that the promisor would behave sensibly. This requirement survived during the natural law era as did certain traditional exceptions to it: for example, even without the formality, courts would

23. For an argument that these considerations can explain the way American courts apply such doctrines as consideration, promissory reliance, waiver, and offer and acceptance, see James Gordley, "Enforcing Promises," *California Law Review* 83 (1995), 547.

24. Aristotle, *Nicomachean Ethics* IV.vii 1127<sup>a</sup>–1127<sup>b</sup>; Thomas Aquinas, *Summa theologiae* II–II, Q. 88, a. 3; Q. 110, a. 3, ad. 5.

25. Cajetan (Tomasso de Vio), *Commentaria* to Thomas Aquinas, *Summa*

*theologiae* (1698), to II–II, Q. 88, a. 1; Q. 113, a. 1.

26. Connanus, *Commentariorum iuris civilis libri* 10 (1724), I.6.v.1.

27. Domenico Soto, *De iustitia et iure libri decem* (1553), lib. 8, q. 2, a. 1; Ludovicus Molina, *De iustitia et iure tractatus* (1614), disp. 262; Leonardus Lessius, *De iustitia et iure, ceterisque virtutibus cardinalis* (1628), lib. 2, cap. 18, dub. 2; Grotius, *De iure belli ac pacis* II.xi.1.5; Pufendorf, *De iure naturae ac gentium* II.v.9.



enforce promises to charitable causes (*ad causas pias*),<sup>28</sup> to people on account of their marriage (*ad nuptias vel propter nuptias*),<sup>29</sup> or to someone who had conferred a benefit on the promisor, for example, by rescuing him from robbers (*donatio remuneratoria*).<sup>30</sup>

When the promisor made a gratuitous promise but not one to give away property, the late scholastics could not see why the promise should not be binding right away, without any need for delivery. The promisor might be able to perform without making himself any poorer, and so there wasn't the same need to ensure deliberation. In a gratuitous loan for use or consumption, he might be loaning something that he did not need for a while. In a deposit, he might be able to look after the other party's goods without any cost to himself. In any event, the late scholastics thought that, in principle, these gratuitous contracts were binding on consent if the promisor intended to be bound. But they said that he should be able to demand his goods back if he found that he needed them himself even if he had promised that the promisee could keep them for a longer time.<sup>31</sup> The Roman rule seems to have been that he had to let the promisee keep them for as long as he had promised.<sup>32</sup>

The late scholastics and the northern natural lawyers had been discussing when promises were binding in principle, or as they put it, as a matter of natural law. They acknowledged that the Roman law was different. Often, they invented pragmatic justifications for these deviations: for example, the Romans wished to avoid a flood of litigation. Nevertheless, their work undermined the Roman system by providing a coherent, philosophically grounded account of which promises should be enforced. Eventually, the Roman distinctions ceased to be part of continental positive law. They were abolished by statute in a few places such as Castile.<sup>33</sup> Elsewhere, beginning in the sixteenth century, jurists simply declared that the custom of courts was not to follow this rule.<sup>34</sup> By the eighteenth century this view had become universal.<sup>35</sup> The Roman system had disappeared.

Nanz has shown that the first jurist to mention this custom was Wesenbeck who miscited earlier jurists who had not mentioned it.<sup>36</sup>

28. Molina, *De iustitia et iure* disp. 279 no. 2; Lessius, *De iustitia et iure* lib. 2, cap. 18, dub. 13, no. 102.

29. Molina, *De iustitia et iure* disp. 279 no. 7.

30. Molina, *De iustitia et iure* disp. 279 no. 6.

31. Molina, *De iustitia et iure* disp. 294, nos. 8–10; Lessius, *De iustitia et iure* lib. 2, cap. 27, dub. 5.

32. Dig. 13.6.17.3 (“[A]fter he has made the loan, not only decency but the obligation undertaken between lender and borrower prevent his fixing time limits and claiming the object back in disregard of the times agreed...”).

33. Molina, *De iustitia et iure* disps. 257–8.

34. Johannes Voet, *Commentarius ad pandectas* (1698), to Dig. 2.14 no. 9; Wolfgang

Lauterbach, *Collegii theoretico-practici* (1744), to Dig. 2.14 no. 68; Johannes Wissenbach, *Exercitationum ad l. pandectarum libros* (1661), lib. 2, disp. 9 no. 35; Arnoldus Vinnius, *In quatuor libros institutionum imperialium commentarius academicus et forensis* (1726), to I.3.14 no. 11. See Burkhard Struvius, *Syntagma iurisprudentiae secundum ordinem pandectarum coccinatum* (1692), to Dig. 2.14 no. 32 (arguing that some agreements still would not be enforced when the parties did not so intend).

35. Zimmermann, *Law of Obligations*, 539–40.

36. Matthaeus Wesenbeck, *In pandectas iuris civilis et codicis iustiniani libros viii commentaria* (1597), col. 189 to Dig. 2.14. Klaus-Peter Nanz, *Die Entstehung des allgemeinen Vertragsbegriff im 16. bis 18.*

Later jurists cited Wesenbeck. To start a major legal reform by a miscitation is a bit like starting a landslide with a pebble. It only works if something is almost ready to fall by its own weight. Wesenbeck and his successors would not have been so seemingly careless had they wished to reach a different conclusion. Wesenbeck explained why he favored the conclusion he did reach: by the natural law, all promises should be enforced.<sup>37</sup>

Nevertheless, even though naked pacts were now enforceable, the rule that promises of gifts required a formality was preserved. Jurists continued to give the same explanation as Molina and Lessius: the rule encouraged deliberation.<sup>38</sup> Eventually, such a requirement passed into the modern French and German Civil Codes, although the formality became subscribing to the promise before a notary.

### French Civil Code

#### ARTICLE 893

A liberality is an act by which a person disposes gratuitously of all or part of his goods or his rights for the benefit of another person.

An act of liberality can only be done by a gift *inter vivos* or a testament.

#### ARTICLE 931

All gifts *inter vivos* must be made before notaries in the ordinary form of a contract and an original copy shall remain with the notary; otherwise the gift is void.

### German Civil Code

#### § 516 CONCEPT (OF A GIFT)

A gift is a disposition by which one person enriches another out of his own property if both parties agree that the disposition is made gratuitously.

#### § 518 FORM

Notarial authentication is required for the validity of a contract by which a performance is promised as a gift . . .

By and large, however, the Codes did not preserve traditional exceptions to the requirement for gifts to charities, to people about to marry, and to someone who had previously done a service for the promisor. One exception is a German provision.

*Jahrhundert* (1985), 85. See Italo Birocchi, "La questione dei patti nella dottrina tedesca dell'Usus modernus," in *Toward a General Law of Contract* (John Barton, ed., 1990), 197–213, 146–55.

<sup>37</sup>. Wesenbeck, *Commentaria* col. 189 to Dig. 2.14.

<sup>38</sup>. Molina, *De iustitia et iure* disp. 278 no. 5; Lessius, *De iustitia et iure* lib. 2, cap. 18, nos. 2, 8.

§ 1624 ENDOWMENT (*AUSSTATTUNG*) FROM THE PARENTS' ASSETS

(1) What a child is to be given by the father or mother on account of marriage or obtaining an independent position in life, for founding or preserving the establishment of the position in life (endowment), even when there is no obligation to do so, only counts as a gift to the extent that the endowment exceeds the amount that is appropriate under the circumstances, and in particular, the financial situation of the father or mother.

In any event, when the required formality is completed, a promise of gift is enforceable although in France and Germany, gifts can be revoked for gross ingratitude,<sup>39</sup> and in Germany, if the donor becomes unable to support himself or to fulfill his legal duty to support others.<sup>40</sup>

Similarly, in France and Germany, the parties can bind themselves in advance of delivery to make a gratuitous loan, to care for another's goods, or to give a pledge. But in the case of gratuitous loans, even if the lender agreed the borrower can keep the object until a certain date, he can demand it back earlier if he needs it.

## French Civil Code

### ARTICLE 1888

The lender [in a loan for use] cannot take back the object loaned before the date agreed, or, if there was no agreement, before the object has served the use for which it was borrowed.

**39.** French Civil Code art. 955: An inter vivos gift may be revoked for ingratitude only in the following cases:

1. If the donee attempts to take the life of the donor;
2. If the donee has been cruel to him, wrongs him unlawfully, or seriously harms him;
3. If the donee has refused him support [in case of need].

#### German Civil Code

§ 530 Revocation of gift: A gift may be revoked if the donee is guilty of gross ingratitude on account of serious misconduct toward the donor or a near relative of his ...

#### **40.** German Civil Code

§ 519 Defense of need: The donor is entitled to refuse to perform a promise of gift insofar as he is not in position to fulfill his promise when, taking into account his other obligations, he cannot do so without endangering his own maintenance or his legal duties to maintain others.

§ 528 Requiring return because of need: After the gift has been bestowed, the donor can require that the donee return the gift in accordance with the provisions that govern restitution of unjust enrichment if the donor is not in a position to maintain himself reasonably or to fulfill his legal duty to maintain his relatives, his spouse or his former spouse. The donee may avoid returning it by payment of the amount required for maintenance ...

§ 529 Barring of the claim for return: The claim for return of the gift is barred if the donee has brought about his poverty intentionally or by gross negligence or if ten years have elapsed since the gift was bestowed.

The same rule applies if the donee is not in a position to return the gift, having regard to his other obligations, without endangering the maintenance appropriate to his own status in life or his legal duty to maintain others.

## ARTICLE 1889

Nevertheless, if during this period or before the need of the borrower is at an end, the judge can require the borrower to return the object if the lender has a pressing and unforeseen need for it.

**German Civil Code**

## § 605 RIGHT TO ABROGATE

The lender can abrogate [a loan for use]:

(1). when he needs the object loaned because of circumstances that were unforeseeable . . .

Thus the structure of modern civil law looks much as it did in the natural law era even though, by the nineteenth century, the Aristotelian ideas that originally inspired it no longer seemed to make sense. Jurists were developing “will theories” of contract: contract was an expression of the will of the parties, and the job of contract law was simply to enforce their will. The requirement that a contract must have a *causa* or *cause* had passed into the French Civil Code. But in the nineteenth century, it seemed to be a tautology: the party’s motive for contracting was either to get something or not to get something. Thus the nineteenth-century French found it hard to see how a contract could fail to have a *cause*.<sup>41</sup> Sometimes they explained a contract without a *cause* as one without a “legally sufficient motive,”<sup>42</sup> one made by mistake,<sup>43</sup> one concerning an object that was non-existent<sup>44</sup> or which the buyer already owned.<sup>45</sup> But if that was all the doctrine of *cause* meant, it was hard to see why there should be such a doctrine rather than simply a doctrine of mistake. Similarly, the nineteenth-century German jurists had no use for the doctrine as traditionally understood. It did not appear in the German Civil Code.

**2. Common Law**

As mentioned earlier, before the nineteenth century, the common lawyers organized their thinking, not in terms of tort and contract, but in terms of the traditional forms of action. By the eighteenth century, a disappointed promisee could sue in one of two forms of action: covenant or assumpsit. He could recover in covenant only if the promise had been made under seal, a formality originally performed by making an impression in wax on the document containing the promise. He could recover in assumpsit if the promise had “consideration.”

41. Charles Aubry and Charles Rau, *Cours de droit civil français* 4 (4th edn., 1869–71), § 345 n. 7; A.M. Demante and E. Colmet de Santerre, *Cours analytique de Code Civil* 5 (2nd edn., 1883), § 47; Charles Demolombe, *Cours de Code Napoléon* 24 (1854–82), § 357; Charles Toullier, *Le Droit civil français suivant l’ordre du Code* 5 (4th

edn., 1824–37), § 166. See François Laurent, *Principles de droit civil français* 15 (3rd edn., 1869–78), §§ 110–11.

42. Aubry and Rau, *Cours* 4: § 345.

43. Toullier, *Droit civil* 6: § 168.

44. Demolombe, *Cours* 24: § 357.

45. Léobon Larombière, *Théorie et pratique des obligations* 1 (1857), 273–5.

There is famous and inconclusive controversy about whether the common law courts originally borrowed the idea that a promise needs consideration from the civil law idea of a *causa* of an onerous contract.<sup>1</sup> However that may have been, the common law courts found consideration, not only for promises to exchange, but for other promises that were not exchanges or bargains in the normal sense: for example, promises to give money to prospective sons-in-law and a variety of gratuitous loans and bailments.<sup>2</sup> In *Coggs v. Bernard*, defendant had negligently broken open and spilled the contents of some of plaintiff's casks of brandy while moving them from one place to another. The court held that there was consideration for his promise to look after them even though he had not been paid: "the owner's trusting him with the goods is a sufficient consideration."<sup>3</sup> Actually, it is misleading to compare *causa* and consideration since the doctrines were devised for different purposes. The continental doctrine identified the reasons why, in principle or theory, a promise should be enforced. The common law doctrine was a pragmatic tool for limiting the enforceability of promises. In the common law, for centuries, "consideration" was not a term one could define. Promises were enforceable in those cases in which courts had said there was "consideration" because it seemed sensible to enforce them.

The search for a definition of "contract" and "consideration" began in the late eighteenth and early nineteenth centuries when common lawyers began to write treatises. Following continental authors, the treatise writers defined "contract" in terms of promise, engagement, agreement, or assent.<sup>4</sup> And, often citing continental authors, they identified "consideration" with the *causa* of an onerous contract.<sup>5</sup> As Simpson has said, the early nineteenth-century treatise writers regarded consideration as a local version of the doctrine of *causa*.<sup>6</sup> At first, the treatise writers did not explain the cases in which promises had been held to have consideration although they were not exchanges in any normal sense.

The common lawyers thus gave their contract law a shape like that of the civil law. Promises to make gifts were enforceable only with a formality although in common law the formality required was a seal. Promises to bargain or exchange were enforceable without a formality.

1. A.W.B. Simpson, *A History of the Common Law of Contract* (1975), 316–405.

2. *Ibid.* 416–52.

3. (1703) 92 Eng. Rep. 107 (K.B.).

4. William Blackstone, *Commentaries on the Laws of England* 2 (14th edn., 1803), \*442; Samuel Comyn, *A Treatise on the Law Relative to Contracts and Agreements Not Under Seal* (1809), I \*2; John Newland, *A Treatise on Contracts Within the Jurisdiction of Courts of Equity* (1821), 1; Joseph D. Chitty, *A Practical Treatise on the Law of Contracts Not Under Seal* (1826), 3; James Kent, *Commentaries on American Law* 2 (13th edn., 1884), \*450; William Wentworth Story, *A Treatise on the Law of*

*Contracts Not Under Seal* (3rd edn., 1851), 1; Theophilus Parsons, *The Law of Contracts* 1 (4th edn., 1860), \*6; S. Martin Leake, *The Elements of the Law of Contracts* (1867), 7–8.

5. Blackstone, *Commentaries* 2, \*444–6; John J. Powell, *Essay Upon the Law of Contracts and Agreements* 1 (1790), 331; William Taylor, *A Treatise on the Differences Between the Laws of England and Scotland Relating to Contracts* (1849) 16; W.W. Story, *Law of Contracts*, 431, 431 n. 1; Comyn, *Contracts and Agreements*, 1: \*8; Kent, *Commentaries*, 2: \*630.

6. A.W.B. Simpson, "Innovation in Nineteenth Century Contract Law," *Law Quarterly Review* 91 (1975), 247 at 262.

At first, the nineteenth-century common lawyers explained consideration as the natural lawyers had explained the *causa* of a contract of exchange. They said the reason or sole motive of each party was to receive an equivalent. Christopher Columbus Langdell even claimed that “[a]s every consideration is in theory equal to the promise in value, so it is in theory the promisor’s sole inducement to make the promise.”<sup>7</sup> He acknowledged that this definition did not fit the common law cases, but the reason, he said, was that the law shut its eyes to certain discrepancies.

As on the continent, in the nineteenth century, these expressions no longer seemed to make sense. Oliver Wendell Holmes pointed out that a party might have many motives for contracting: “A man may promise to paint a picture for five hundred dollars, while his chief motive may be a desire for fame.”<sup>8</sup> Sir Frederick Pollock quoted Thomas Hobbes: “[T]he value of all things contracted for, is measured by the appetite of the contractors, and therefore the just value, is that which they be contented to give.”<sup>9</sup>

Consequently, just as, on the continent, the doctrine of *causa* either disappeared or was no longer understood in the same way, so, in England and the United States, the requirement of consideration was reformulated. Pollock managed to define bargain so as to accommodate the common law cases without using concepts like equivalence that had become mysterious. At the same time, he managed to fit most of the cases in which English courts had said there was consideration. According to Pollock, whatever “a man chooses to bargain for must be conclusively taken to be of some value to him.”<sup>10</sup> That was so even if the man himself had received nothing, consideration having moved to a third party. The rule that a court will not “enter into an inquiry as to the adequacy of consideration” is reached “by a deduction” from this principle.<sup>11</sup> Therefore, to say the promisor entered into a bargain simply means he was induced to give his promise by some change in the position of the promisee.<sup>12</sup> A variation of Pollock’s formula was adopted in the United State by Holmes.<sup>13</sup>

Modern authorities still explain consideration in terms of “bargain”<sup>14</sup> or “reciprocity.”<sup>15</sup> Like Pollock, however, they define bargain in terms of something, of whatever value, sought by the promisor which induces him to promise.<sup>16</sup> But that does not mean that the only promises that lack

7. Christopher Columbus Langdell, *A Summary of the Law of Contracts* (1880), 78–9.

8. Oliver Wendell Holmes Jr., *The Common Law* (1881), 293.

9. Sir Frederick Pollock, *Principles of Contract* (4th edn., 1888), 172.

10. Pollock, *Principles of Contract* (10th edn., 1936), 172.

11. *Ibid.* 172.

12. *Ibid.* 164.

13. Holmes, *Common Law*, 293–4; Letter from Holmes to Pollock, June 17, 1880 in Mark de Wolfe Howe (ed.), *The Holmes-Pollock Letters* 1 (2nd edn., 1961),

14–15. Holmes had received a manuscript of the first edition of Pollock’s treatise (Letter from Pollock to Holmes, Dec. 16, 1875, in *ibid.* 276) which contained the core of Pollock’s theory. Pollock, *Principles of Contract* (1st edn., 1876), 150–1.

14. Restatement (Second) of Contracts §§ 17, 71 (1981).

15. G.H. Treitel, *The Law of Contract* (9th edn., 1995), 63.

16. Restatement (Second) of Contracts § 71 (1981) (“A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise . . . .”); Treitel, *Law of Contract*,



consideration are those to give gifts or do favors in any ordinary sense. Suppose, for example, that someone promises to hold an offer open (as in *Dickenson v. Dodds*, below). If he receives nothing in return for this commitment, there is no consideration. Suppose, that after the parties contract, one agrees to pay the other more or to accept less. If the other party gives nothing in return beyond what he was already under contract to give, again there is no consideration.

Today, Anglo-American jurists are less inclined to apply the doctrine formalistically and more inclined to ask whether any useful purpose is served by refusing to enforce a promise. When the promise is a gift or favor, the purpose may be the same that civil law systems achieve by other means: to encourage a person to act deliberately. When a promise is made in a business context, the purpose presumably is a different one. In the case of a promise to hold an offer open or to pay more or accept less than originally agreed, the purpose seems to be to prevent one party from taking unfair advantage of another. But if that is so, the doctrine of consideration is a blunt instrument since not all such promises are unfair.

Melvin Eisenberg has concluded that in such cases we no longer need a doctrine of consideration. American courts now can review the fairness of a contract directly by applying a doctrine called “unconscionability.”

Others have tried to modify the traditional doctrine of consideration. In the United States, the Uniform Commercial Code, which governs the sale of goods and has been adopted in virtually every state, provides that among merchants, a written promise to hold an offer to sell goods open for a reasonable time does not require consideration.<sup>17</sup> The British Law Commission has recommended providing by statute that a firm offer is to be binding if it is made in the course of business and is expressed to be irrevocable for a definite period which is not to exceed six years.<sup>18</sup>

Similarly, under the Uniform Commercial Code, consideration is no longer required for promises to take less or give more than initially agreed in a sale of goods.<sup>19</sup> The Second Restatement of Contracts recommends a different approach: consideration is not required if the modification is fair because of a change of circumstances or enforcing the promise is fair because the promisee changed his position in reliance on it.<sup>20</sup> In England, the traditional doctrine was changed in *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd.*<sup>21</sup> A contractor

68 (“The consideration for a promise (unless it is nominal or invented) is always a motive for promising . . .”). But while Pollock had said that the promise must be made to the promisee in order to induce him to change his legal position, the Second Restatement provides that “[t]he performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.” According to Treitel, consideration can be either a benefit to the promisor or a

detriment to the promisee, although he requires that consideration move from the promisee. *Law of Contract*, 77–8. The number of cases in which these variants would produce a different result is rather small, and, indeed, the precise meaning of them is not very clear.

17. U.C.C. § 2–205.

18. Working Paper 60 (1975).

19. U.C.C. § 2–209.

20. Restatement (Second) of Contracts § 89 (1981).

21. [1991] 1 Q.B. 1.



promised extra money to a subcontractor for completing the performance to which he had already agreed. He did so because his own surveyor recognized that the amount originally promised was too low, and because he was afraid that if the subcontractor had financial difficulties, he would not be able to complete the work on time. The subcontractor had not threatened that unless paid more he would not perform. Traditionally, the promise of extra payments would have been unenforceable. But the court held that the “practical benefit” that the contractor received would count as consideration.

Another escape route from the rigidities of the doctrine of consideration has been to hold that a promise without consideration can still have legal effects if the promisee changes his position in reliance on it. This doctrine, called promissory estoppel or promissory reliance, has been taken further in the United States than in England. In the United States, the promisor is liable to the promisee who relies.

### **Restatement (Second) of Contracts**

#### **§ 90 PROMISE REASONABLY INDUCING ACTION OR FORBEARANCE**

- (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
- (2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

The last sentence of Subsection (1) was added in the Second Restatement to allow courts to award a promisee his reliance damages – compensation for the amount that he had been hurt by relying on the promise – rather than his expectation damages – the amount necessary to put him where he would have been had the promise been kept.

Subsection (2) was added in the Second Restatement to reflect the way in which courts had actually been applying the doctrine of promissory estoppel. Before the rise of the doctrine of promissory estoppel, courts in the United States (though not in England) had continued to say there is consideration for promises to prospective children-in-law and had sometimes found consideration for promises to a charity: for example, in naming a fund after the donor. Finding consideration in such cases seemed a bit fictitious. After the First Restatement, courts began applying the doctrine of promissory reliance instead. But they did not demand proof of reliance: proof that the couple would not have married otherwise, or that the charity really changed its position because of the promise. Subsection (2) makes it clear that the promisee does not have to provide such proof.

A doctrine of promissory reliance has also been accepted in England, but there it is much more limited. There, the doctrine protects a person who relies on a promise so as to excuse his performance of a prior obligation. But it does not create a new obligation to perform. As it is sometimes said, the doctrine can be used as a shield but not as a sword. For example, in *Central London Property Trust Ltd. v. High Trees House Ltd.*,<sup>22</sup> the landlords had rented a block of flats on a ninety-nine year lease. In 1940, they agreed to take a lower rent because war-time conditions made it harder to find tenants. According to Lord Denning, they would not be able to recover the full rent originally agreed because of the reliance of the defendants. In a case like this, the doctrine is a shield which prevents the plaintiff from successfully suing on the defendant's original promise. In contrast, in *Combe v. Combe*,<sup>23</sup> during divorce proceedings, a husband promised to pay his wife £100 per year, and she relied on that promise by not asking the court for maintenance. She was not able to use the doctrine of promissory reliance as a sword, to enforce the promise.

### 3. Chinese Law

#### The Republic of China

The Nationalist (Kuomintang) government of China promulgated the Civil Code of the Republic of China (ROC) in 1929, which was modeled on the German Civil Code and included five books: general principles, obligations, property, family, and successions. This Civil Code is still in use in Taiwan.

The German Civil Code was chosen partly because it was thought to be the most sophisticated of Western civil codes, and partly because it had served as a model in Japan, which seemed to be successful both in Westernizing its law and modernizing its economy.

The Civil Code of the ROC had some features which, as we will see, are distinctive of the German Civil Code. Free revocation of an offer is by and large the default rule among major jurisdictions with the exception of German law, which binds the offeror to the offer until it is rejected. This view was adopted by the ROC Civil Code, which provides that an offer is irrevocable until it is rejected.<sup>1</sup> Like the German Civil Code, that of the ROC incorporated what became an overarching principle of good faith (*Treu und Glauben*).<sup>2</sup> This principle was adopted by the Contract Law of the People's Republic of China in 1999.<sup>3</sup> As in German law, liability for breach of contract was deemed to be based on fault, not strict liability.<sup>4</sup> Relief was given for impossibility only when the party to perform was not at fault.<sup>5</sup> Another German feature was the rule that entitled the non-breaching party to

22. [1951] 2 K.B. 215.

23. [1947] KB 130.

1. Arts. 154, 155 Civil Code of Republic of China (1929).

2. *Ibid.* art. 219.

3. See Contract Law of People's Republic of China (1999), art. 6.

4. ROC Civil Code, art. 220.

5. *Ibid.* arts. 225, 226.

performance,<sup>6</sup> giving him the option of either demanding performance or receiving damages.<sup>7</sup>

### The People's Republic of China

Under the socialist law that preceded the reforms of the past decades, transactions between individuals were deemed illegal but could not be regulated since the law did not allow transactions between private parties. Outside the shadow economy, the only transactional relationships between the state and private parties were the procurement of products from the state and supply of commodities to individuals.

The institution of contract was a tool to ensure the implementation of state plans.<sup>8</sup> Contracting connected state enterprises systematically and helped to clarify and determine the content of state plans.<sup>9</sup> Since no private interest was involved, all the contracting parties were simply executing orders from the state. Therefore, the contracting parties were to collaborate and supervise each other throughout the performance of contract to carry out the state's agenda.<sup>10</sup> Any deviation of the state economic plan or directive would result in the nullity of the contract.

The rules applicable to such contracts were mostly procedural and did not originate from a doctrinal basis that lawyers are familiar with. For example, in the 1950s, the only written law that dealt with contracts was the eleven-article Provisional Methods on Contractual Agreement made between Government Agencies, State Enterprises, and Cooperatives ("Provisional Methods"). Under this law, contracts could only be entered into by state-owned enterprises (SOEs), government agencies or cooperatives, in writing, and registered at the People's Banks (the central bank of China)<sup>11</sup> if the payment could not be processed immediately. Contracts, upon conclusion, had to be filed with the appropriate regional government and its economic commission, and also filed in the record of the department of the Treasury.<sup>12</sup> All bank loans required a guarantor for the borrowing party. An agency of the government was the default guarantor and under the duty to supervise the enforcement of the contract.<sup>13</sup> Compulsory dispute resolution mechanisms were to be employed before a contract dispute could be adjudicated by a court. Disputes regarding non-performance or breach of contract first had to be submitted to a higher governmental authority for mediation since all businesses were owned by the state, and operated in the same way as a government agency. If both parties were from the same province, their disputes had to be submitted to the higher level government's economic commission.<sup>14</sup> If the parties were from different provinces, the disputes had to be submitted to the economic commission under the central government.<sup>15</sup>

6. *Ibid.* art. 227.

7. *Ibid.* art. 220.

8. Pitman B. Potter, *The Economic Contract Law of China, Legitimation and Autonomy in the PRC* (Seattle, 1992), 26.

9. *Ibid.* at 27.

10. Hao Jiang, "Freedom of Contract under State Supervision," *Geo. Mason J. Int'l Com. L.* 7 (2016), 202, 220.

11. Provisional Methods, arts. 1–2.

12. *Ibid.* art. 2.

13. *Ibid.* art. 6.

14. *Ibid.* art. 10.

15. *Ibid.*

A suit could only be filed in court when mediation by higher authority could not solve the disputes.<sup>16</sup>

Still, due to the lack of incentive of SOE managers to perform the contract, contracts were not rigorously enforced. As it had been observed by Pitman Potter,

Enterprise budgets were fixed and were generally unaffected by the nonfulfillment of contracts. Enterprise managers bore very little responsibility for losses caused by nonperformance of contracts, since such losses were generally made up by the state, either through an adjustment of the aggrieved party's planned production quota or by directly absorbing the deficit suffered by the aggrieved party.<sup>17</sup>

Therefore, the remedy for late delivery would probably "take the form of an apology and a promise to deliver as soon as possible."<sup>18</sup>

At the end of the 1970s, reforms were instituted to develop a private economy without privatizing the SOEs. The Economic Contract Law (ECL) was enacted in 1981 to introduce contract doctrines into the law. The ECL was a compromise between the planned economy and the market economy, between public administrative law and private law. Rights and interests of the contracting parties were finally recognized. The parties' wills were respected when they did not conflict with laws, public policies and state economic plans. Violation of state economic plans would result in the nullity of a contract. The notion of voidable contracts did not exist: any defect in contracting would result in absolute nullity. Contracting activities were closely monitored by the state: the forms that a contract must take and the contents and terms that must be included were stipulated in the ECL.

In 1999, a Western inspired Contract Law was adopted as a hallmark of China's transition from a pure planned economy into a socialist market economy. For the first time, principles such as freedom of contract and good faith were introduced. Contractual autonomy was increased by detailed doctrines such as offer and acceptance, relative nullity, and a non-breaching party's options to choose between specific performance and damages, which appeared for the first time since 1949.

Courts soon learnt to respect freedom of contract. Indeed, had this principle not been respected at all, the reform in China would have been pointless. On account of this principle, courts are reluctant to interfere with the terms of a contract which have been set by the parties. In China, however, given the absence of a competitive market and the state's inability to monitor every single contractual transaction carried out by SOE managers, it is inevitable that freedom of contract will be abused in the sale of state assets, privatization of smaller SOEs, and many bidding procedures. SOE managers have an incentive to deal with their relatives,

16. *Ibid.*

18. *Ibid.* 42.

17. Pitman B. Potter, *The Economic Contract Law of China, Legitimation and Autonomy in the PRC* (Seattle, 1992), 27.

and with the people who bribed them most heavily or to transfer state assets into their own hands at lower than the market value. Though all such conduct is punishable by criminal law, contracts entered into by these managers are not absolutely null. They should not be in principle. Even though SOE managers committed crimes in contracting, the SOE might still have business or policy reasons to adhere to the contract. However, according to both the decisions of the Supreme Court<sup>19</sup> and the State Assets Law,<sup>20</sup> transactions that concern either the sales of small sized SOEs<sup>21</sup> or state assets, will automatically be declared null if there was a malicious conspiracy that harms the state interest. Still, out of respect for freedom of contract, courts do not examine whether the contracts that result from corruption, bribery, failure to comply with valuation methods prescribed by law, and conspiracy are tantamount to stripping state assets. The passivity of judicial practice, in a sense, encourages the stripping of state assets.

Thus there is a danger of abuse when SOE managers are allowed the same contractual autonomy in disposing of state assets that courts allow in the West. Freedom of contract can lose its value if Chinese law protects only external formalism by enforcing the terms set forth in a contract when SOE decision-makers do not have to bear the negative consequences of contracting. If a party does not have to bear these consequences, it will not always look out for the best interest of the enterprise. When the state has to bear the negative consequences of the SOE's disposing of state assets, the price of a contract and its fairness matter. The will expressed by a contracting party to dispose of state assets should be invalid if the sole motive for the transaction was to strip state assets. It is one thing to allow private investors to decide whether the prices of their contracts appear advantageous to them. It is another to allow SOE managers to have the same level of freedom. Applying freedom of contract to SOEs to its full extent encourages the stripping of state assets. Denying it fully will make commercial dealings impossible in the Chinese society. Freedom of contract should be the default norm, but its abuse can only be avoided if courts review the substantive terms of a contract when the circumstances warrant doing so.

Conversely, sometimes state interference with contractual autonomy allows an SOE to renege on a bad bargain. A condition is put in the contract that depends solely on the state's will or whim. If the state were a party to the contract, such a condition would be a potestative condition, that is, one that allows the validity of a contract to be determined by one of the parties at that party's discretion. Such a condition would make a contract null. However, technically, the state is not a party to the contract though it has a controlling equity interest in the contracting party, and it is financially

19. 最高人民法院关于审理与企业改制相关的民事纠纷若干问题的规定 [Supreme Court Rules on various issues regarding civil disputes in restructuring of state-owned enterprises].

20. See 中华人民共和国企业国有资产法 [Law on State-owned Assets in Enterprises

of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2008, effective May 1, 2009), art. 72.

21. In China, privatization of SOEs only extends to small and medium SOEs.

affected by its own administrative decisions made at its unbridled discretion. In cases that involve asset stripping, courts have not acted paternalistically enough. They have shown too much respect for the freedom of contract. In contrast, however, in these cases courts have been overly paternalistic. To preserve the value of state assets, they have allowed SOEs to renege on a bargain solely because it is more profitable to do so. Consequently, a contract no longer serves the purpose of allowing the parties to allocate the risk of future price changes. One party is allowed to speculate at the other party's expense.

Contract law became part of Chinese Civil Code in 2020. Much more than a mere integration of existing contract law, the Code integrated contract law systematically into the civil law framework, and codified certain rules established in the cases and judicial interpretations to fill the doctrinal gaps in the statutory laws. Moreover, the Code also further legitimizes the state's role to enforce production orders to provide help in major crises such as Covid-19.

Contract is considered a subcategory of civil juristic acts in German-inspired civil law systems including China. There have been inconsistencies and contradictory rules over the validity of contracts and civil juristic acts. Voidability that is due to the same vitiating factors may nevertheless differ depending on the existence of state interest. For example, under the 1986 General Principles of Civil Law, vitiating factors such as fraud, duress, and mistake will render a civil juristic act void.<sup>22</sup> In Contract Law, the concept of relative nullity was first introduced to give the aggrieved party the option to keep the contract alive.<sup>23</sup> Vitiating factors will then make a contract only voidable, which contradicts the General Principles of Civil Law. Moreover, even within the Code of Contract Law, there are tensions between Article 52-1 and Article 54. Fraud and duress would render a contract merely voidable under Article 54 but the contract will be void and null if fraud and duress harmed a state interest. As I have shown elsewhere,<sup>24</sup> state interest is not public interest but more likely the financial interest of state-owned enterprises, which only adds to the doctrinal uncertainties.

The Civil Code streamlined the rules concerning validity and eliminated the differences in the treatment of contracts and civil juristic acts. Now there is only one set of rules that deals with the validity of civil juristic acts and it applies to contracts. According to the Civil Code, illegality, sham transactions, and violation of good morals will render a civil juristic act void and null.<sup>25</sup> Victims of fraud, duress, mistake and obvious unfairness have the option to avoid the civil juristic act by a claim before the court or arbitration institution.<sup>26</sup> Moreover, as the Civil Code emphasizes the equal protection of public and private interests, the Code no longer has special rules that afford state interest greater protection. At least in its form,

22. General Principles of Civil Law, art. 58. State Interest in the Chinese Contract Law," *J. Civ. L. Stud.* 7 (2014), 147.

23. Contract Law, art. 54.

25. Civil Code, arts. 143–6.

24. See generally Hao Jiang, "Enlarged State Power to Declare Nullity: The Hidden

26. Civil Code, arts. 147–51.



Chinese codification of private law has moved towards a body of law that does not subscribe to a particular political ideology and that levels the playing field between state and private enterprises.

Certain legal vacuums are being filled in the Civil Code. There is a category of properly formed contracts that would not have legal effect until appropriate state approval is obtained. Such contracts are called effect-to-be-determined contracts. A prime example of this is the Sino-foreign joint venture agreements. Under Chinese law, a joint venture agreement that involves a foreign party needs to be approved by state authority. As a result, a contract will have no legal effect until such a procedure is completed. In such contracts there will normally be a clause that assigns the domestic party the obligations of obtaining such approval. The domestic party that has second thoughts would technically be unable to default on their contractual obligations since there is not yet a contract. Previously, this issue could only be resolved by case law. In a well-known 2009 Supreme Court case, the court held that parties are still bound by the contractual obligations to seek approval; such terms are binding even though the contract itself is not yet effective.<sup>27</sup> The rule has become Article 502 of the Civil Code. According to Article 502-2, a party can sue for breach of contract if the duty to seek approval is breached by the other party even though the contract is not yet effective because of the breach.

Change of circumstances is a doctrine that excuses contractual performance when performance will not serve the purpose of the contract or will be excessively expensive. Chinese law first adopted the doctrine through the Supreme Court's judicial interpretation in 2009. The Civil Code formally adopts two articles in dealing with change of circumstances. The first resembles section 313 of the German Civil Code in which relief is given if the basis of the transaction is destroyed because the performance became excessively expensive due to the occurrence of a non-commercial risk.<sup>28</sup> The second article excuses the duty to perform but not liability for damages when the purpose of the contract is frustrated. As in German law, the non-breaching party is always entitled to demand performance. Sometimes, the non-breaching party will demand performance when the performance has become pointless to both parties. In the Feng Yumei case,<sup>29</sup> the plaintiff demanded a 22 square meter store she purchased from the developer of a mall when the developer had rebranded the whole mall (6000 square meters) for a different line of business and the store she purchased could no longer exist. The developer was willing to pay damages but Feng Yumei insisted on performance. The court held that performance can be excused and damages awarded. Even though the plaintiff is, in principle, entitled to performance, requiring it will result in an obviously unfair outcome. The Code, based on this case, adopted this common law-inspired doctrine of frustration of purpose. Still, this new doctrine does not function in the same way as in common law. In common law, frustration of

27. 广东仙源与广州中大等公司的股权转让纠纷案 (2009)民申字第1068号 [Xianyuan v. Zhongda, (2009) Min Shen Zi No. 1068].

28. Chinese Civil Code, art. 533.

29. 冯玉梅诉新宇公司商品房买卖合同纠纷 (2004) 宁民四终字第470号 [Feng Yumei v. Xinyu Corp. [(2004) Nin Min Si Zhong Zi No. 470]].



purpose would result in the termination of contract and the non-performing party will no longer be required to pay damages. Here, Article 580-2 only operates to excuse a party from a demand for specific performance but not the liability to pay damages.

The new law creates a unique scenario: when a performance becomes excessively expensive, the adversely affected party will have two options: he could seek to terminate the contract under Article 533 or, if that fails, he could ask to be excused from performing the contract and pay damages instead. Clear standards will need to be established that distinguish these situations.

This major codification came at a time when China is engaged in the fight against the novel coronavirus. The Chinese Civil Code adopted a provision that is similar to the Defense Production Act in the US, and which requires the appropriate private parties to accept state production orders when a need arises for disaster relief or disease prevention purposes.<sup>30</sup>

In forty years, Chinese contract law has transformed from a simple tool to document transactions that implemented state economic plans where private interest was considered illegitimate to a systematic codified law that predominantly protects security of transactions and treats private and state interests indistinguishably. It remains to be seen whether the evolving pro-transaction attitude reflected in the Code will ease the tensions between state and private interests.

## II. VOLUNTARY COMMITMENT

### 1. The Moment at which a Commitment Is Binding

In comparing the rules described in this section, consider whether the offeree who mails an acceptance before receiving a revocation of an offer can hold the offeror to the contract (a) if the offeror receives his acceptance, and (b) if he does not, for example, because it is lost in the mail. Consider whether the offeror who has sent a revocation should be bound in these situations.

#### Common Law

##### **Adams v. Lindsell, (1818) 1 Barn. & Adl. 681 (K.B.)**

“The defendants, who were wool dealers in St. Ives, wrote to the plaintiffs, who were wool manufacturers in Bromsgrove, Worcester: ‘We now offer you eight hundred tods of wether fleeces, of a good fair quality of our country wool, at 35s. 6d. per tod, to be delivered at Leicester, and to be paid for by two months’ bill in two months, and to be weighed up by your agent within fourteen days, receiving your answer in course of post.’

30. Chinese Civil Code, art. 494.

This letter was misdirected by the defendants, to Bromsgrove, Leicestershire, in consequence of which it was not received by the plaintiffs in Worcestershire till 7 p.m. on Friday, September 5th. On that evening the plaintiffs wrote an answer, agreeing to accept the wool on the terms proposed. The course of the post between St. Ives and Bromsgrove is through London, and consequently this answer was not received by the defendants till Tuesday, September 9th. On Monday, September 8th, the defendants not having, as they expected, received an answer on Sunday, September 7th (which in case their letter had not been misdirected would have been in the usual course of the post), sold the wool in question to another person." . . .

The defendants argued: "Till the plaintiffs' answer was actually received there could be no binding contract between the parties; and before then the defendants had retracted their offer by selling the wool to other persons." But the court said that "if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them that the plaintiffs' answer was received in course of post."

## Restatement (Second) of Contracts

### § 63 TIME WHEN ACCEPTANCE TAKES EFFECT

Unless the offer provides otherwise,

(a). an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror . . . .

## Dickinson v. Dodds, [1876] 2 Ch. Div. 463 (C.A.)

"On Wednesday, the 10th of June, 1874, the defendant John Dodds signed and delivered to the plaintiff, George Dickinson, a memorandum, of which the material part was as follows:

I hereby agree to sell to Mr. George Dickinson the whole of the dwellinghouses, garden ground, stabling, and outbuildings thereto belonging, situate at Croft, belonging to me, for the sum of £800. As witness my hand this tenth day of June, 1874.

[Signed] J. Dodds.

In the afternoon of the Thursday [June 11], the plaintiff was informed by a Mr. Berry that Dodds had been offering or agreeing to sell the property

to Thomas Allan, the other defendant. Thereupon the plaintiff, at about half past seven in the evening, went to the house of Mrs. Burgess, the mother-in-law of Dodds, where he was then staying, and left with her a formal acceptance in writing of the offer to sell the property. According to the evidence of Mrs. Burgess this document never in fact reached Dodds, she having forgotten to give it to him.

On the following (Friday) morning, at about seven o'clock, Berry, who was acting as agent for Dickinson, found Dodds at the Darlington railway station, and handed to him a duplicate of the acceptance by Dickinson, and explained to Dodds its purport. He replied that it was too late, as he had sold the property. A few minutes later Dickinson himself found Dodds entering a railway carriage, and handed him another duplicate of the notice of acceptance, but Dodds declined to receive it, saying: 'You are too late. I have sold the property.' ...

The court said: "The document, though beginning 'I hereby agree to sell,' was nothing but an offer, and was only intended to be an offer, for the plaintiff himself tells us that he required time to consider whether he would enter into an agreement or not. Unless both parties had then agreed, there was no concluded agreement then made; it was in effect and substance only an offer to sell. The plaintiff, being minded not to complete the bargain at that time, added this memorandum: 'This offer to be left over until Friday, 9 o'clock a.m. 12th June, 1874.' That shows it was only an offer. There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until 9 o'clock on Friday morning; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that promise, and could not in any way withdraw from it, or retract it, until 9 o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear settled law, on one of the clearest principles of law, that this promise, being a mere *nudum pactum*, was not binding, and that at any moment before a complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself.

Well, that being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, 'Now I withdraw my offer.' It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retraction. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case, beyond all question, the plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, 'I withdraw the offer.' This is evident from the plaintiff's own statements in the bill."

**Restatement (Second) of Contracts****§ 25 OPTION CONTRACTS**

An option contract is a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer.

**§ 87 OPTION CONTRACT**

- (1). An offer is binding as an option contract if it
  - (a). is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time; or
  - (b). is made irrevocable by statute.
- (2). An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or such forbearance is binding as an option contract to the extent necessary to prevent injustice.

**Uniform Commercial Code****§ 2.205 FIRM OFFERS**

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of revocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

**Note.** As mentioned earlier, the Uniform Commercial Code has been enacted in virtually all American states. Article 2 governs the sale of goods.

**German Law****German Civil Code****§ 145 BINDING FORCE OF AN OFFER**

One who has offered to conclude a contract with another is bound by that offer unless he states that he is not bound.

**§ 146 THE LAPSE OF AN OFFER**

The offer lapses if the offeror is refused or if he is not given an acceptance within due time according to §§ 147–49.

**§ 147 TIME TO ACCEPT**

An offer made to a person who is present can only be accepted immediately. That is so as well when an offer is made by one person to another by telephone.

An offer made to a person who is absent can be accepted only within the time that an answer would be expected under ordinary circumstances.

**French Law****French Civil Code**

## ARTICLE 1115

An offer may be withdrawn freely as long as it has not reached the person to whom it was addressed.

## ARTICLE 1116

An offer may not be withdrawn before the expiry of any period fixed by the offeror or, if no such period has been fixed, the end of a reasonable period. The withdrawal of an offer in contravention of this prohibition prevents the contract being concluded. The person who thus withdraws an offer incurs extra-contractual liability under the conditions set out by the general law, and has no obligation to compensate the loss of profits which were expected from the contract.

## ARTICLE 1117

An offer lapses on the expiry of the period fixed by the offeror or, if no period is fixed, at the end of a reasonable period. It also lapses in the case of the incapacity or death of the offeror.

## ARTICLE 1118

An acceptance is the manifestation of the will of the offeree to be bound on the terms of the offer. As long as the acceptance has not reached the offeror, it may be withdrawn freely provided that the withdrawal reaches the offeror before the acceptance. An acceptance which does not conform to the offer has no effect, apart from constituting a new offer.

**Chinese Law****Chinese Civil Code**

## ARTICLE 476

An offer may be revoked except for the following circumstances:

- (1). if it expressly indicates that is irrevocable, whether by stating a fixed time for acceptance or otherwise.
- (2). if the offeree has reason to regard the offer as irrevocable, and has begun to prepare to perform the contract.

## ARTICLE 477

Revocation of an offer made in person during a conversation must be communicated before the offeree accepts the offer; revocation of an offer not made during a conversation must reach the offeree before he accepts ...

## ARTICLE 478

An offer ceases to be effective under the following circumstances:

- (1). a notice of rejection of the offer reaches the offeror;
- (2). the offeror revokes the offer according to law;

- (3). offer expires before being accepted;
- (4). the offeree materially modifies the terms of the offer ...

## ARTICLE 483

A contract is formed when an acceptance is effective except as otherwise prescribed by law or by agreement between the parties ...

## ARTICLE 486

An acceptance dispatched by the offeree after expiration of the period for acceptance constitutes a new offer, unless the offeror timely advises the offeree that the acceptance is valid.

## ARTICLE 487

Where an acceptance dispatched within the period of acceptance in a fashion that would reach the offeror in time but reached offeree after the expiration date due to other reasons, the acceptance is still effective unless the offeror advises the offeree in a timely manner that the acceptance is not acceptable beyond the expiration date.

### The Draft Common Frame of Reference

Two “Commissions on European Contract Law,” sponsored by funds from the Commission of the European Union, and under the direction of Ole Lando, drafted a set of “Principles of European Contract Law.” The Second Commission, which met from 1992–96, continued the work of the First, which met from 1980–90. Their “Principles” have not been enacted as law. They were intended to serve the following purposes: “to serve as a foundation for European legislation,” to govern a contract in the event of “express adoption by the parties,” to provide “a modern formulation of the *lex mercatoria* or law merchant,” and to serve as “a model for the judicial and legislative development of contract law” and “a basis for harmonization.” (Ole Lando and Hugh Beale, eds., *Principles of European Contract Law* (2000), xxiii–xxiv.)

In 2001, the European Commission issued a Communication relating to contract law, and, in 2003, an Action Plan. In response to this plan, a project was launched funded by the European Commission, which produced a Draft Common Frame of Reference (DCFR) published in 2007. Its provisions on contract law were based on the Lando “Principles.” Some see the DCFR as a draft of what may become a civil code unifying the private law of member states of the European Union. According to its drafters, however, it is “[a]n academic, not a politically authorised text.”

It must be stressed that what we refer to today as the DCFR originates in an initiative of European legal scholars. It amounts to the compression into rule form of decades of independent research and co-operation by academics with expertise in private law, comparative law and European Community law. The independence of ... all the contributors has been maintained and respected unreservedly at every stage of our labours. That in turn has made it possible to take on board many of the suggestions received in the course of a large number of

meetings with stakeholders and other experts throughout the continent ... In particular, [the DCFR] does not contain a single rule or definition or principle which has been approved or mandated by a politically legitimated body at European or national level (save, of course, where it coincides with existing EU or national legislation). (Draft Common Frame of Reference, Introduction 4.)

## The Draft Common Frame of Reference

### ARTICLE II 4:202: REVOCATION OF OFFER

- (1). An offer may be revoked if the revocation reaches the offeree before the offeree has dispatched an acceptance or, in cases of acceptance by conduct, before the contract has been concluded.

...

- (3). However, a revocation of an offer is ineffective if:
  - (a). the offer indicates that it is irrevocable;
  - (b). the offer states a fixed time for its acceptance; or
  - (c). it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

### ARTICLE II 4:203: REJECTION OF OFFER

When a rejection of an offer reaches the offeror, the offer lapses.

### ARTICLE II 4:205: TIME OF CONCLUSION OF THE CONTRACT

- (1). If an acceptance has been dispatched by the offeree the contract is concluded when the acceptance reaches the offeror.

### ARTICLE II 4:206: TIME LIMIT FOR ACCEPTANCE

- (1). An acceptance of an offer is effective only if it reaches the offeror within the time fixed by the offeror.
- (2). If no time has been fixed by the offeror the acceptance is effective only if it reaches the offeror within a reasonable time.

## The Unidroit Principles of International Commercial Contracts

UNIDROIT is an acronym for the International Institute for the Unification of Private Law. It is an independent intergovernmental organization founded in 1926. At the time of the drafting of the Unidroit Principles of International Commercial Law, the organization was composed of twenty-six member states. While approved by the member states, the Principles are not binding either as legislation or as a treaty. They have been described by Michael Joachim Bonnell, under whose leadership they were drafted, as “an international restatement of contract law.” The purposes to be served by the Principles are described in the provisions of the Preamble quoted below.



## The Unidroit Principles of International Commercial Contracts

### PREAMBLE (PURPOSE OF THE PRINCIPLES)

These Principles set forth general rules for international commercial contracts.

They shall be applied when the parties have agreed that their contract be governed by them.

They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.

They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law.

They may be used to interpret or supplement international uniform law instruments.

They may serve as a model for national and international legislators.

### ARTICLE 2.1 MANNER OF FORMATION

A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.

### ARTICLE 2.3 WITHDRAWAL OF OFFER

- (1). An offer becomes effective when it reaches the offeree.
- (2). An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

### ARTICLE 2.4 REVOCATION OF OFFER

- (1). Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before it has dispatched an acceptance.
- (2). However, an offer cannot be revoked
  - (a). if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
  - (b). if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

### ARTICLE 2.5 REJECTION OF OFFER

An offer is terminated when a rejection reaches the offeror.

### ARTICLE 2.6 MODE OF ACCEPTANCE

- (1). A statement or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.
- (2). An acceptance of an offer becomes effective when the indication of assent reaches the offeror.
- (3). However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective when the act is performed.

## 2. Liability before a Final Commitment Is Made

### English Law

#### **Walford v. Miles, [1992] 2 A.C. 128 (H.L.)**

Lord Ackner. "The respondents owned a company, together with premises which were let to the company where it carried on a photographic processing business. In 1986 the respondents decided to sell the business and the premises and received an offer of £1.9 m from a third party. In the meantime, the appellants entered into negotiations with the respondents and on 12 March 1987 the respondents agreed in principle to sell the business and the premises to them for £2 m and warranted that the trading profits in the 12 months following completion would be not less than £300,000. On 7 March it was further agreed in a telephone conversation between the parties that if the appellants provided a comfort letter from their bank by a specified date confirming that the bank had offered them loan facilities to enable them to make the purchase for £2 m the respondents 'would terminate negotiations with any third party or consideration of any alternative with a view to concluding agreements' with the appellants and that even if the respondents received a satisfactory proposal from any third party before the close of business on 20 March 1987 they 'would not deal with that third party and nor would [they] give further consideration to any alternative.' The appellants duly provided the comfort letter from their bank in the time specified and on 25 March the respondents confirmed that, subject to contract, they agreed to the sale of the property and the shares in the company at a total price of £2 m. On 30 March the respondents withdrew from the negotiations and decided to sell to the third party because they were concerned that their staff would not get on with the appellants and that a loss of staff would put the warranted £300,000 profit in jeopardy.

Although the cases in the United States did not speak with one voice your Lordships' attention was drawn to the decision of the United States Court of Appeals, Third Circuit in *Channel Home Centers Division of Grace Retail Corp v Grossman* (1986) 795 F 2d 291 as being 'the clearest example' of the American cases in the appellants' favour. That case raised the issue whether an agreement to negotiate in good faith, if supported by consideration, is an enforceable contract. I do not find the decision of any assistance. While accepting that an agreement to agree is not an enforceable contract, the United States Court of Appeals appears to have proceeded on the basis that an agreement to negotiate in good faith is synonymous with an agreement to use best endeavours and, as the latter is enforceable, so is the former. This appears to me, with respect, to be an unsustainable proposition. The reason why an agreement to negotiate, like an agreement to agree, is unenforceable is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours. This uncertainty is demonstrated in the instant case by the provision which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations

have been determined 'in good faith.' However, the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms. Mr Naughton [the plaintiff's attorney] of course, accepts that the agreement upon which he relies does not contain a duty to complete the negotiations. But that still leaves the vital question: how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an 'agreement'? A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from these negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly, a bare agreement to negotiate has no legal content."

**William Lacey (Hounslow), Ltd. v. Davis, [1957] 2 All E.R. 712 (Q.B.)**

"D., the owner of certain premises, which had suffered war damage, obtained tenders [i.e., bids] from three builders, including the plaintiffs, for the rebuilding of the premises as a shop with residential flats above. The plaintiffs' tender, which was received in January, 1951, was the lowest and the plaintiffs were led to believe that they would receive the contract. At the request of D.'s agents, they then calculated the timber and steel required for the proposed building for the purpose of obtaining the necessary licences, and they also submitted their estimate for the notional reconstruction of the building as it was before the war damage and a schedule of the basic prices on which their original tender was based, in order to enable D. to negotiate with the War Damage Commission the amount payable to him under the War Damage Act, 1943. A licence in respect of the original plans having been refused by the Ministry of Works, the plaintiffs were asked to submit a revised estimate in respect of new plans, although D. did not intend to decide on the type of house which he proposed to erect until the amount of his war damage claim had been agreed. The plaintiffs undertook a considerable amount of work in preparing their revised estimate, which was submitted in December, 1951, and they also provided further particulars required by D. for the War Damage Commission. As a result of the estimates and the other information provided by the plaintiffs, the amount receivable by D. from the War Damage Commission was substantially increased. After the commission's decision had been given in April, 1952, the plaintiffs were asked to submit another estimate in regard to revised plans and, later, to make still further amendments to the new estimate. After they had complied with these requests they were informed that D. intended to

employ another builder to rebuild the premises. Subsequently D. sold the premises instead of having them rebuilt.”

Barry, J. “On this evidence, I am quite satisfied that the whole of the work covered by the schedule fell right outside the work which a builder, by custom and usage, normally performs gratuitously, when invited to tender for the erection of a building . . . The earlier estimates, as the correspondence shows, were in fact used, and used for some purpose, in Mr. Davis’ negotiations with the War Damage Commission and, an apparent result of the plaintiffs’ efforts, not only were the reconstruction plans approved, but a much higher ‘permissible amount’ was also agreed with the War Damage Commission. It is perhaps justifiable to surmise that these facts, especially the reconstruction plans and the increase in the permissible amount, had at least some influence on the price of the damaged building which Mr. Davis obtained when it was ultimately sold by him.

The work itemised in the schedule which does not relate to estimation, as I think, falls even more clearly outside the type of work which any builder would be expected to do without charge when tendering for a building contract. The plaintiffs are carrying on a business and, in normal circumstances, if asked to render services of this kind, the obvious inference would be that they ought to be paid for so doing. No one could expect a business firm to do this sort of work for nothing, and again, in normal circumstances, the law would imply a promise to pay on the part of the person who requested the services to be performed. Counsel for the defendants, however, submits that no such promise can be implied, in the circumstances of the present case. The existence, he submits, of a common expectation that a contract would ultimately come into being, and that the plaintiffs’ services would be rewarded by the profits of that contract, leaves no room for – and, indeed, wholly negatives – any suggestion that the parties impliedly agreed that these services would be paid for in any other way.

This, at first sight, is a somewhat formidable argument which, if well founded, would wholly defeat the plaintiffs’ alternative claim. If such were the law, it would, I think, amount to a denial of justice to the plaintiffs in the present case, and legal propositions which have that apparent effect must always be scrutinised with some care. In truth, I think that counsel’s proposition is founded on too narrow a view of the modern action for quantum meruit . . . In these quasi-contractual cases the court will look at the true facts and ascertain from them whether or not a promise to pay should be implied, irrespective of the actual views of intentions of the parties at the time when the work was done or the services rendered . . .

I am unable to see any valid distinction between work done which was to be paid for under the terms of a contract erroneously believed to be in existence, and work done which was to be paid for out of the proceeds of a contract which both parties erroneously believed was about to be made. In neither case was the work to be done gratuitously, and in both cases the party from whom payment was sought requested the work and obtained the benefit of it. In neither case did the parties actually intend to pay for the work otherwise than under the supposed contract, or as part of the total

price which would become payable when the expected contract was made. In both cases, when the beliefs of the parties were falsified, the law implied an obligation – and in this case I think the law should imply an obligation – to pay a reasonable price for the services which had been obtained. I am, of course, fully aware that in different circumstances it might be held that work was done gratuitously merely in the hope that the building scheme would be carried out and that the person who did the work would obtain the contract. That, I am satisfied, is not the position here.”

### Law in the United States

#### **Channel Home Centers v. Grossman, 795 F.2d 291 (3rd Cir. 1986)**

“This diversity case presents the question whether, under Pennsylvania law, a property owner’s promise to a prospective tenant, pursuant to a detailed letter of intent, to negotiate in good faith with the prospective tenant and to withdraw the lease premises from the marketplace during the negotiation, can bind the owner for a reasonable period of time where the prospective tenant has expended significant sums of money in connection with the lease negotiations and preparation and where there was evidence that the letter of intent was of significant value to the property owner. We hold that it may ...

In the third week of November, 1984, Tri-Star wrote to Richard Perkowski, Director of Real Estate for Channel, informing him of the availability of store location in Cedarbrook Mall which Tri-Star believed Channel would be interested in leasing. Perkowski expressed some interest, and met the Grossmans on November 28, 1984. After Perkowski was given a tour of the premises, the terms of a lease were discussed. App. at 457a, 498a. Frank Grossman testified that ‘we discussed various terms, and these terms were, some were loose, some were more or less terms.’ App. at 364a, 496a–497a ...

Frank Grossman [part owner of Tri-Star] then requested that Channel execute a letter of intent that, as Grossman put it, could be shown to ‘other people, banks or whatever.’ App. at 366a–367a ... Apparently, Frank Grossman was anxious to get Channel’s signature on a letter of intent so that it could be used to help Grossman secure financing for his purchase of the mall. App. at 366a–367a, 497a.

On December 11, 1984, in response to Grossman’s request, Channel prepared, executed, and submitted a detailed letter of intent setting forth a plethora of lease terms which provided, *inter alia*, that:

‘[t]o induce the Tenant [Channel] to proceed with the leasing of the Store, you [Grossman] will withdraw the Store from the rental market, and only negotiate the above described leasing transaction to completion.’

‘Please acknowledge your intent to proceed with the leasing of the store under the above terms, conditions and understanding by signing

the enclosed copy of the letter and returning it to the undersigned within ten (10) days from the date hereof.'

Frank Grossman promptly signed the letter of intent and returned it to Channel.

On February 6, 1985, Frank Grossman notified Channel that 'negotiations terminated as of this date' due to Channel's failure to submit a signed and mutually acceptable lease for the mall site within thirty days of the December 11, 1984 letter of intent. App. at 42a. (This was the first and only written evidence of the purported thirty-day time limit. The letter of intent contained no such term . . .) On February 7, 1985, Mr. Good Buys and Frank Grossman executed a lease for the Cedarbrook Mall. App. at 147a–196a. Mr. Good Buys agreed to make base-level annual rental payments which were substantially greater than those agreed to by Channel in the December 11, 1984 letter of intent. App. at 147a. Channel's corporate parent, Grace, approved the terms of Channel's proposed lease on February 13, 1985. App. at 443a–444a . . .

It is hornbook law that evidence of preliminary negotiations or an agreement to enter into a binding contract in the future does not alone constitute a contract. See *Goldman v. McShain*, 432 Pa. 61, 68, 247 A.2d 455, 458 (j1968); *Lombardo v. Gasparini Excavating Co.*, 385 Pa. 388, 392, 123 A.2d 663, 666 (1956); *Kazanjian v. New England Petroleum Corp.*, 332 Pa.Super. 1, 7, 480 A.2d 1153, 1157 (1984); see Restatement (Second) of Contracts § 26 (1979). Appellees believe that this doctrine settles this case, but, in so arguing, appellees misconstrue Channel's contract claim. Channel does not contend that the letter of intent is binding as a lease or an agreement to enter into a lease. Rather, it is Channel's position that this document is enforceable as a mutually binding obligation to negotiate in good faith. By unilaterally terminating negotiations with Channel and precipitously entering into a lease agreement with Mr. Good Buys, Channel argues, Grossman acted in bad faith and breached his promise to 'withdraw the Store from the rental market and only negotiate the above-described leasing transaction to completion.'

Under Pennsylvania law, the test for enforceability of an agreement is whether both parties have manifested an intention to be bound by its terms and whether the terms are sufficiently definite to be specifically enforced . . .

Applying Pennsylvania law, then, we must ask (1) whether both parties manifested an intention to be bound by the agreement; (2) whether the terms of the agreement are sufficiently definite to be enforced; and (3) whether there was consideration . . .

The letter of intent, signed by both parties, provides that '[t]o induce the Tenant [Channel] to proceed with the leasing of the Store, you [Grossman] will withdraw the Store from the rental market, and only negotiate the proposed leasing transaction with Channel to completion.'

Evidence of record supports the proposition that the parties intended this promise to be binding. After the letter of intent was executed, both



Channel and the Grossmans initiated procedures directed toward satisfaction of lease contingencies. Channel directed its parent corporation to prepare a draft lease; Channel planning representatives visited the lease premises to obtain measurements for architectural alterations, renovations, and related construction. Channel developed extensive marketing plans; delivery schedules were prepared and material and equipment deemed necessary for the store were purchased. The Grossmans applied to the township zoning committee for permission to erect Channel signs at various locations on the mall property. Channel submitted a draft lease on January 11, 1985, and the parties, through correspondence and telephone conversations and on-site visits, exhibited an intent to move toward a lease as late as January 23, 1985 . . . Accordingly, the letter of intent and the circumstances surrounding its adoption both support a finding that the parties intended to be bound by an agreement to negotiate in good faith.

We also believe that Grossman's promise to 'withdraw the Store from the rental market and only negotiate the above described leasing transaction to completion,' viewed in the context of the detailed letter of intent (which covers most significant lease terms . . .), is sufficiently definite to be specifically enforced, provided that Channel submitted sufficient legal consideration in return."

**Hoffman v. Red Owl Stores, Inc., 133 N.W. 2d 267 (Wis. 1965)**

"The complaint alleged that Lukowitz, as agent for Red Owl Stores, represented to and agreed with plaintiffs that Red Owl would build a store building in Chilton and stock it with merchandise for Hoffman to operate in return for which plaintiffs were to put up and invest a total sum of \$18,000; that in reliance upon the above mentioned agreement and representations plaintiffs sold their bakery building and business and their grocery store and business; also in reliance on the agreement and representations Hoffman purchased the building site in Chilton and rented a residence for himself and his family in Chilton; plaintiffs' actions in reliance on the representations and agreement disrupted their personal and business life; plaintiffs lost substantial amounts of income and expended large sums of money as expenses. Plaintiffs demanded recovery of damages for the breach of defendants' representations and agreements . . .

The action was tried to a court and jury. The facts hereafter stated are taken from the evidence adduced at the trial. Where there was a conflict in the evidence the version favorable to plaintiffs has been accepted since the verdict rendered was in favor of plaintiffs.

Hoffman assisted by his wife operated a bakery at Wautoma from 1956 until sale of the building late in 1961 . . . Red Owl is a Minnesota corporation having its home office at Hopkins, Minnesota. It owns and operates a number of grocery supermarket stores and also extends franchises to agency stores which are owned by individuals, partnerships and corporations . . .

In November, 1959, Hoffman was desirous of expanding his operations by establishing a grocery store and contacted a Red Owl representative by



the name of Jansen, now deceased. Numerous conversations were had in 1960 with the idea of establishing a Red Owl franchise store in Wautoma. In September, 1960, Lukowitz succeeded Jansen as Red Owl's representative in the negotiations. Hoffman mentioned that \$18,000 was all the capital he had available to invest and he was repeatedly assured that this would be sufficient to set him up in business as a Red Owl Store. About Christmastime, 1960, Hoffman thought it would be a good idea if he bought a small grocery store in Wautoma and operated it in order that he gain experience in the grocery business prior to operating a Red Owl store in some larger community. On February 6, 1961, on the advice of Lukowitz and Sykes, who had succeeded Lukowitz as Red Owl's district manager, Hoffman bought the inventory and fixtures of a small grocery store in Wautoma and leased the building in which it was operated.

After three months of operating this Wautoma store, the Red Owl representatives came in and took inventory and checked the operations and found the store was operating at a profit. Lukowitz advised Hoffman to sell the store to his manager, and assured him that Red Owl would find a larger store for him elsewhere. Acting on this advice and assurance, Hoffman sold the fixtures and inventory to his manager on June 6, 1961. Hoffman was reluctant to sell at that time because it meant losing the summer tourist business, but he sold on the assurance that he would be operating in a new location by fall and that he must sell this store if he wanted a bigger one. Before selling, Hoffman told the Red Owl representatives that he had \$18,000 for 'getting set up in business' and they assured him that there would be no problems in establishing him in a bigger operation. The makeup of the \$18,000 was not discussed; it was understood plaintiff's father-in-law would furnish part of it. By June 1961, the towns for the new grocery store had been narrowed down to two, Kewaunee and Chilton. In Kewaunee, Red Owl had an option on a building site. In Chilton, Red Owl had nothing under option, but it did select a site to which plaintiff obtained an option at Red Owl's suggestion. The option stipulated a purchase price of \$5,000 with \$1,000 to be paid on election to purchase and the balance to be paid within 30 days. On Lukowitz's assurance that everything was all set plaintiff paid \$1,000 down on the lot on September 15th.

On September 27, 1961, plaintiff met at Chilton with Lukowitz and Mr. Reymund and Mr. Carlson from the home office who prepared a projected financial statement. Part of the funds plaintiffs were to supply as their investment in the venture were to be obtained by sale of their Wautoma bakery building.

On the basis of this meeting Lukowitz assured Hoffman: '[E]verything is ready to go. Get your money together and we are set.' Shortly after this meeting Lukowitz told plaintiffs that they would have to sell their bakery business and bakery building, and that their retaining this property was the only 'hitch' in the entire plan. On November 6, 1961, plaintiffs sold their bakery building for \$10,000. Hoffman was to retain the bakery equipment as he contemplated using it to operate a bakery in connection with his Red Owl store. After sale of the bakery Hoffman obtained employment on the night shift at an Appleton bakery . . .

[Eventually, Red Owl presented Hoffmann with a statement which he interpreted to require] 'a total of \$34,000 cash made up of \$13,000 gift from his father-in-law, \$2,000 on mortgage, \$8,000 on Chilton bank loan, \$5,000 in cash from plaintiff, and \$6,000 on the resale of the Chilton lot.' ... Hoffman informed Red Owl he could not go along with this proposal, and particularly objected to the requirement that his father-in-law sign an agreement that his \$13,000 advancement was an absolute gift. This terminated the negotiations between the parties ...

Originally the doctrine of promissory estoppel was invoked as a substitute for consideration rendering a gratuitous promise enforceable as a contract. See Williston, *Contracts* (1st ed.), p. 307, sec. 139. In other words, the acts of reliance by the promisee to his detriment provided a substitute for consideration. If promissory estoppel were to be limited to only those situations where the promise giving rise to the cause of action must be a definite with respect to all details that a contract would result were the promise supported by consideration, then the defendants' instant promises to Hoffman would not meet this test. However, sec. 90 of Restatement, 1 *Contracts*, does not impose the requirement that the promise giving rise to the cause of action must be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee. Rather the conditions imposed are:

- (1). Was the promise one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee?
- (2). Did the promise induce such action or forbearance?
- (3). Can injustice be avoided only by enforcement of the promise?

We deem it would be a mistake to regard an action grounded on promissory estoppel as the equivalent of a breach of contract action. As Dean Boyer points out, it is desirable that fluidity in the application of the concept be maintained. 98 *University of Pennsylvania Law Review* (1950), 459, at page 497. While the first two of the above listed three requirements of promissory estoppel present issues of fact which ordinarily will be resolved by a jury, the third requirement, that the remedy can only be invoked where necessary to avoid injustice, is one that involves a policy decision by the court. Such a policy decision necessarily embraces an element of discretion.

We conclude that injustice would result here if plaintiffs were not granted some relief because of the failure of defendants to keep their promises which induced plaintiffs to act to their detriment."

**Note.** Courts in the United States have recognized a duty to perform a contract in good faith once it has been made. But they have not recognized a duty to negotiate in good faith absent an agreement to do so or, as in *Red Owl*, a promise on which the plaintiff has relied. Alan Farnsworth claimed that American law does not need to recognize such a duty because the plaintiff should recover only if the defendant has deceived him during negotiations, broken an express or implied promise made during negotiations, or enriched himself unjustly by

receiving something from the plaintiff before a contract was made.<sup>1</sup> In all of these cases, American courts would give relief because of deceit, the breaking of a promise, or unjust enrichment. Ewoud Hondius, a leading continental jurist, has said that, aside from some caveats that do not matter here, “I would underwrite [Farnsworth’s] opinion”<sup>2</sup> as to when relief should be given. Farnsworth also claimed that with rare exceptions, continental courts that recognize a duty to negotiate in good faith actually give relief in the same circumstances as American courts, although he acknowledged there have been exceptions. One of them, he said, is the first case in the next section, the decision of the *Cour de cassation* of March 20, 1972. Consider whether, with this exception, the decisions of French and German courts in the following sections would be decided the same way in the United States, as Farnsworth claims. If so, consider why that case is an exception.

## French Law

### French Civil Code

#### ARTICLE 1104

Contracts must be negotiated, formed and performed in good faith. This provision is a matter of public policy.

#### ARTICLE 1112

The commencement, continuation and breaking-off of precontractual negotiations are free from control. They must mandatorily satisfy the requirements of good faith. In case of fault committed during the negotiations, the reparation of the resulting loss is not calculated so as to compensate the loss of benefits which were expected from the contract that was not concluded.

**Note.** Articles 1104 and 1112 were added to the Code by Ordonnance no. 2016–131 of February 10, 2016. Before then, courts gave relief for breaking off contractual negotiations in bad faith under what are now Articles 1240–1.

### **Cour de cassation, ch. comm. et finan., March 20, 1972, Bull. civ. 1972.IV. no. 93**

The court below found that the *Société des établissements Gerteis* entered into negotiations in April 1966 with the *Société établissements Vilber-Lourmat*, the sole distributor in France of machines, used for the manufacture of cement pipes made by the American firm Hydrotile Co. After Robert Gerteis made a trip to the United States from May 13 to 23, 1966 in order to observe the operation of these machines, the *Société Gerteis* requested from the *Société Vilber-Lourmat* further information before making its choice among several types of machines manufactured

1. E. Allan Farnsworth, “Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations,” *Colum. L. Rev.* 87 (1987), 217.

2. Ewoud Hondius, “General Report,” in E. Hondius, ed., *Precontractual Liability Reports to the XIIIth Congress International Academy of Comparative Law Montreal*, Canada, 18–24 August 1990 (1991), 3, 27.

by the Hydrotile company. The *Société Vilber-Lourmat* did not reply to this letter. The *Société Gerteis* learned later that on June 4, 1966, the American manufacturer had sent an estimate to *Vilber-Lourmat* which it had not transmitted the estimate to *Gerteis*. On June 16, 1966, *Vilber-Lourmat* signed a contract with the company *Les Tuyaux Centrifugés du Rhin*, a competitor of *Gerteis*, for the sale for a Hydrotile machine. The contract contained a clause obligating *Vilber-Lourmat* not to sell a similar machine in an area including the east of France for twenty-four months from the delivery of the machine ordered by the company *Les Tuyaux Centrifugés*.

The court below “found that *Vilber-Lourmat* had deliberately withheld the final estimate of the American firm intended for *Gerteis* and had broken off the negotiations it had entered into with *Gerteis* brutally (*brutalement*), unilaterally and without a legitimate reason when they were far advanced when *Gerteis*, as *Vilber-Lourmat* knew, had made large expenditures, and *Vilber-Lourmat* had kept *Gerteis* for a long time in a state of uncertainty . . . *Vilber-Lourmat* therefore did not live up to the rules of good faith in commercial relations.” It was accordingly “liable for a delict.” The *Cour de cassation* held that the court below had correctly found that there had been “an abusive breaking off of negotiations” noting that although *Vilber-Lourmat* “had inquired one last time to learn *Gerteis*’s intentions [it] did not furnish the slightest justification for breaking off negotiations and . . ., in any event, such extended negotiations could not be terminated by a simple telephone call whose occurrence was more than problematic.”

**Note.** As mentioned earlier, Alan Farnsworth claimed that relief should only be given when the defendant deceived the plaintiff, made and broke a promise, or unjustly enriched himself during negotiations. He claimed those are the circumstances in which continental courts normally give relief although he acknowledged that this French case was an exception. Another case he regarded as an exception is Dutch: the decision *Plas v. Valburg, Hoge Raad*, June 18, 1982, NJ 1983, 723, in which the plaintiff construction firm submitted a proposal to the municipal authorities of a small town to build a swimming pool. Although there was no official bidding, its proposal was judged the best and was agreed to by the mayor and alderman. Their decision required approval from the city council. It was not approved because, at the initiative of one member of the city council, a rival bid was submitted at a lower price and accepted instead. The highest Dutch court (*Hoge Raad*) ruled in favor of the plaintiff, holding that the process of negotiation is divisible into three stages: an initial one, in which either party can break off negotiations; a middle stage, in which he can do so only if he compensates the other party for expenses incurred; and a final stage in which to break off negotiations at all would be a violation of good faith, and a party who does so is responsible for what a common lawyer would call expectation damages. He is liable, that is, to the same extent that he would be had a final contract been signed. Rarely, if ever, however, has a Dutch court held that negotiations had reached this final stage.

**Cour d'appel, Pau, January 14, 1969, D.S. 1969.J.716**

*Muroiterie Fraisse* was a firm that sold and installed mirrors. The defendant invited *Fraisse* to the site to discuss the installation of some mirrors in its apartment building. *Muroiterie Fraisse* installed mirrors in a model apartment and was paid for doing so. After being invited back to the site and receiving exact measurements, *Fraisse* submitted an estimate for the entire job of 30,800 francs. The defendants rejected it without informing him of the offers of competing firms or giving him a chance to bid a lower price for the job.

The *Cour d'appel* noted that "the *Société Muroiterie Fraisse* has clearly stated . . . that it does not make a claim . . . for failure to perform a supply contract definitively concluded between the parties but for a fault in the negotiation stage anterior to agreement, in other words, for a fault in *contrahendo*." The court rejected this claim, observing that while "it must be recognized, in actual fact, that in the preliminary phase of negotiations, during which the conditions of the contemplated contract are studied and discussed, certain obligations of rectitude and good faith rest on the parties, these obligations clearly relate not to the conclusion of the eventual contract but to the conduct of the negotiators themselves . . . [H]owever, the negotiation phase is designed to permit the eventual contracting parties to study and understand the risks and advantages of the future contract taking into account elements which can be, at times, imponderable and depend more upon intuition than on formal logic . . . [C]onsequently, without seriously compromising individual liberty and commercial security, it could not be easily admitted that a merchant could be liable for not having dealt with a competitor; in other words, any fault in *contrahendo* must be patent, beyond discussion." In this case, the court said, the fact that *Muroiterie Fraisse* had installed mirrors in a model apartment "was irrelevant . . . [as] another, entirely separate, contract was involved, which had been performed, for which the *Muroiterie Fraisse* had received normal compensation and which did not, in itself, imply any obligation for the building as a whole." The initial visit to the worksite "clearly had no object other than to permit the firm to see the job to be done and to enable the owner and his architect to establish relations with the dealer in mirrors." "[A] businessman as experienced as *Fraisse* could not help but know that no reciprocal engagement would be entered into before presentation and acceptance of an estimate." The defendant "had no obligation to accept that estimate if he found it too high; nor can one see any obligation on his part to communicate to *Fraisse* the offers of competitive firms with a view to entering into discussion with *Fraisse* and of causing *Fraisse* to give a lower price in order to obtain the job."

**Cour d'appel, Paris, December 13, 1984, Rev. trim. dr. civ. 1986. 97**

In 1980, the *Société Sofracima* decided to make a film based on the novels of Isaac Bebel, brought together under the title "King Benya." On June 11, 1981, Mlle Isabel Adjani signed a contract hiring her as

the female lead. This contract was ultimately rescinded by the company which paid her an indemnity. Sometime later, the company took up the project again with a new director and some new male actors. It sent Mlle Adjani a new proposal for a contract which indicated that the filming would start between August 15 and September 30, 1984. The provisions that concerned her compensation were left blank. In response, she sent them another proposal which indicated the amount of her remuneration but not when the filming was to start. In May 1984, the company returned this proposal, signed by its legal agent, along with a check for 140,000 francs as a first payment which was to be made on signing the contract. She did not cash the check but returned it to the company. The company sued her for 18 million francs in damages claiming breach of contract and a wrongful breaking off of negotiations. The court held that no contract had been formed because of the "absence of essential provisions": "in the document drafted by the *Société Sofracima*, articles 3 and 4, which would normally govern the compensation of Mlle Adjani, were left blank; in the document drafted by Mme Israel (agent of the artist) the date of filming was not indicated ... ." The court also found that there had been no wrongful breaking off of negotiations: "nothing permits one to say that Mlle Adjani led the *Société Sofracima* to believe with certainty that she would give her consent and sign the contract, and it is shown by the correspondence sent her by the directress of the company that the directress had written to her several times to obtain a definitive response – which, shows the reticence of Mlle Adjani, her refusal to commit herself, and the absence of all the things necessary for her to agree to the proposal."

### German Law

#### Reichsgericht, January 19, 1934, RGZ 143, 219

"The plaintiff claimed 64711.40 Reichsmarks for the delivery of newsprint to the H.B. Corporation in H. ("the Corporation" for short) in April, 1931. On April 21, 1933, it sought security and payment from the defendant, who was the sole shareholder and manager of the Corporation. Thereafter, it delivered more newsprint to the Corporation for 47,878.45 Reichsmarks.

The plaintiff, who has sued the defendant because it is unable to get satisfaction from the Corporation, claims [that] on April 21, 1931, the defendant told its agent M. that he would provide adequate security for the Corporation's debt out of his own assets. This statement also concerned the future delivery of newsprint to the Corporation ... [But adequate security was never provided.]

The appellate court judge found:

- (a). the defendant's declaration of April 21, 1931 to the plaintiff's agent M. that he would provide security was too indefinite, and therefore did not legally bind the defendant ...



- (b). It cannot be shown that in promising to provide security, the defendant ... acted with the intention of harming the plaintiff. Accordingly the defendant is not liable in tort.
- (c). Nevertheless, the defendant negligently harmed the plaintiff by giving him an indication which outwardly considered meant that he agreed to provide security, thereby causing him to make a further delivery. For in April 1931, he had among his personal assets nothing of value that the plaintiff could have considered sufficient security. The defendant was therefore liable to the plaintiff ... for fault in the conclusion of a contract for payment for the second delivery, not, however, for the earlier one ...

The statements made [by defendant] on appeal presuppose that liability for fault in the conclusion of a contract can only arise when the fault of the defendant prevented a contract from arising [whereas here, the contract did not arise because of indefiniteness]. That view is not correct. The appeal cites the *Kommentar von Reichsgerichtsräten*, 6th ed. to BGB § 155 no. 2 where it is said: 'A party is liable for *culpa in contrahendo* for the negative interest [that is, for the harm the other party suffered in reliance] when he was at fault that agreement was not reached because of a concealed disagreement ...' [But] it is never said [in this commentary] that this is the only case in which liability can arise for fault in the conclusion of a contract ... The following pertinent example is given in Staudinger-Werner 9th ed., vol. II(1) to BGB § 276 no. I 2, par. 2: 'During contractual negotiations, one person negligently awakens in the other an objectively unfounded hope that a transaction will be concluded and thereby causes him in a discernable manner to incur expenses which would be of use had the transaction been concluded but are useless otherwise.' The explanation means that in such cases the needs of commerce require that the negligent party be held liable for the harm caused: here, for the useless expense. This liability can be traced neither to contract nor tort since a contract did not come to exist and liability in tort could arise only under § 826 of the Civil Code whose requirements (intention) are not met here."

### **Bundesgerichtshof, February 22, 1989, JZ 1991, 199**

"The first defendant published two newspapers. It was a ... partnership in which the second and third defendants were partners.

In September 1985, negotiations began between the plaintiff and the third defendant, acting on behalf of the first defendant over plaintiff's participation [as an investor] in the first defendant. Afterward, after a number of conversations had been held and the plaintiff had been allowed to study the commercial position of the first defendant, plaintiff's manager and the third defendant agreed, on February 3, 1986, that negotiations would take place on the transfer to the plaintiff of both newspapers instead of the participation of the plaintiff in the first defendant. The plaintiff needed the agreement of the administrative board of its Swiss parent corporation. To make this decision possible, the first defendant prepared a 'detailed offer.'



On February 7, 1986, the plaintiff allowed the defendant to send a draft text of the offer to be given. On March 3, 1986, after further negotiations the defendant offered the plaintiff in writing the acquisition of the rights to both newspapers for 3 million DM, sending along with it alterations in the draft text.

The plaintiff's parent corporation agreed in principle to the acquisition of the newspapers on April 7, 1986. This was communicated to the third defendant on April 10, 1986. On the same day, the plaintiff's legal representative sent a written notification of the intended acquisition to the *Bundeskartellamt* (Federal Cartell Office). On April 11, 1986, after further negotiation between the plaintiff's manager and the third defendant, the plaintiff sent the first defendant the draft of a purchase agreement prepared by its legal representative which was sent back with comments and alterations to the plaintiff on April 15, 1986, by the legal representative and accountant of the first defendant.

On April 17, 1986, the plaintiff's legal representative produced a second draft of the contract. On April 18, 1986, negotiations took place between plaintiff's manager and accountant, on the one hand, and the defendant on the other, in which agreement was reached on the most important points concerning the conclusion of the contract. The plaintiff's legal representative then prepared a third draft of the contract and sent an altered and supplemented notification to the *Bundeskartellamt*.

On April 28, 1986, the plaintiff informed the defendant in writing that it accepted its offer of March 3, 1986. Nevertheless, the same day the third defendant notified the plaintiff by telephone that a transfer of the two newspapers could no longer be considered."

The plaintiff brought suit for 105 773.61 DM which it claimed were the expenses it had incurred in the course of negotiations. Included were the expense of its economic study, accounting and legal fees, secretarial expenses, fees for the *Bundeskartellamt*, office renovations and travel expenses.

"The appellate court said of the basis for this claim that there was no contract between the plaintiff and the first defendant. The offer of March 3, 1986 became ineffective because of later further offers of contract and consequently could no longer be accepted by the plaintiff's statement of April 28, 1986. Moreover, it had been intended that the contract be concluded in writing, and this never occurred (§ 154(2) of the Civil Code).

Neither was a preliminary contract concluded. The plaintiff and the first defendant did not wish to bind themselves before all the points of the contract had been definitely settled and a final written contract had been drafted and signed. Nevertheless, the appellate court found that the defendants were liable for fault in the contractual negotiations having awakened on expectation that a contract would be concluded and then breaking off negotiations without a sufficient ground." The *Bundesgerichtshof* disagreed with this last point and overturned the decision.

“In principle, each party must bear the costs incurred in the expectation that a contract will be concluded. The risk that a contract will not come to be later on and that the expenses will be useless falls on each party to the negotiations himself.

Even when the parties find themselves in long and seriously conducted contractual negotiations, either side can object to the conclusion of a contract without for that reason being liable to make compensation for fault in contractual negotiations (BGH WM 1962, 936, 937 = BB 1962, 816 no. 1335 and WM 1977, 618, 620; Staudinger/Löwisch, *BGB* 12th ed., 1979, to §§ 275–83 no. 54). A duty to pay compensation only exists when a partner to the negotiations is accountable for awakening in the other party the trust – justifiable from his point of view – that a contract will certainly come to be, and then breaks off contractual negotiations without a sufficient reason. (BGH WM 1962, 936; *id.* 1967, 1010, 1011 = NJW 1967, 2199; *id.* WM, 1967, 798, 799; *id.* NJW 1975, 1774 = BB 1975, 1128; *id.* WM 1977, 618; Staudinger/Löwisch *op. cit.*) . . .

The ‘offer’ of March 3, 1986, when objectively evaluated, was not sufficient to arouse this kind of trust by the plaintiff. It may be sufficient as a rule that an offer for a fixed period of time is made (§ 148 of the Civil Code). But the written communication to the first defendant was not an offer within the meaning of § 145 ff. of the Civil Code which would become a contract upon mere acceptance by the plaintiff.

The purpose of the offer as agreed in the conversation of February 3, 1986, was only to make it possible for the administrative board of the plaintiff’s parent corporation to make a decision about whether to agree to the intended acquisition. Accordingly, the ‘detailed offer’ contained only those written provisions for the conclusion of the transaction on which the defendant was willing to agree. The ‘offer’ did not deal with all the questions on which, according to the will of the parties, provision had to be made. It was left open who was to be the contract partner of the defendant, the plaintiff itself or a corporation that it was to organize. (draft contract no. 1) Further, negotiations were to concern the question of which publishing employees were to be taken on by the plaintiff. (*Id.* no. 5) Also the content of a new agreement on competition was not settled. (*Id.* no. 6) The ‘offer’ contained no specification of in what way the third defendant would work for the plaintiff and how the required payments to customers of the newspaper would be taken care of.” The court concluded that the plaintiff could not recover for expenses incurred before the conversation of April 18, 1986. As to whether it could recover for those incurred thereafter, the court said: “It cannot be decided as yet whether the appellate court was correct to award the plaintiff compensation for the expenses incurred for the expenses of notification of the *Bundeskartellamt* [incurred after April 18].

The appellate court maintained that, according to the credible testimony of witness G., in the conversation on April 18, 1986, agreement was reached on all essential points and consequently, because of defendant’s conduct, the plaintiff could rely on the conclusion of a contract.

But this finding is not enough to justify a claim for compensation for fault in contractual negotiations. It is not sufficient that the plaintiff could have the impression, because all the essential points were agreed upon, that a contract would ultimately be concluded. In addition, it must be shown that the first defendant went beyond the mere fact of agreement and presented the conclusion of a contract as certain. An express declaration is not required. But the defendant must at least have made its firm will to conclude a contract to appear clearly. That could be accepted, for example, if the third defendant had encouraged the plaintiff to take measures that would only be of use if a contract should arise . . . .”

**Note.** In 2002, the Civil Code was amended in light of the case law. Section 311(2) of the Code now provides that duties may arise from “1. entering into contractual negotiations; 2. preparation of a contract in which one party, in light of the transactional relation (*rechtsgeschäftliche Beziehung*) to the other party, has allowed his rights, legally protected benefits (*Rechtsgüter*) or interests to be affected, or entrusted them to the other party; or 3. similar transactional relations.” What duties arise is not clear.

### Chinese Law

**Han Shiyuan, *The Law of Contract* (Beijing, 2018), 184–5**

“The legal consequence of fault in contracting is primarily a liability to compensate for the loss . . . The consequences also include continued performance of pre-contractual obligations, return of unjust enrichment, vitiation of the contract and among others such as reduction of the price, the right to repudiate, and an injunction.”

### Compensation of the Reliance Interest

In situations where a contract did not take effect or was void, the aggrieved party is entitled to be put back to the state he was in before contracting, which is, in principle, reliance damage. This is the universal view.

### Chinese Civil Code

#### ARTICLE 7

Parties engaging in civil transactions shall abide by the principle of honesty and credibility (good faith), uphold honesty, and honor commitments.

#### ARTICLE 500

When in the course of concluding a contract, a party engaged in any of the following conduct, and thereby caused loss to the other party, it shall be liable for damages:

- (1). negotiating in bad faith under the pretext of concluding a contract;
- (2). intentionally concealing a material fact relating to the conclusion of the contract or supplying false information;
- (3). any other conduct which violates the principle of good faith. (previously Article 42 of Contract Law)

**King & Zone Law Firm v. Xinjiang LLC & Zou Qide**, 北京君众律师事务所与邹其德、北京信江环境工程有限公司缔约过失责任纠纷(2017)京03民终3588号(2017) **Jing 03 Min Zhong No. 3588**

Zou Qide (Zou) was the legal representative and shareholder of Xinjiang LLC (XJ). In that capacity, he reached out to the King & Zone Law Firm (K&Z) to discuss the provision of legal service that might be needed for the initial public offering (IPO) of shares of Liaoyuan Xinjian LLX (LYXJ), a company for which he was also the legal representative, and which was owned by the same family, if not by the same person, as XJ. Zou and the lawyers discussed the possibility of legal representation over text messages. Zou asked the K&Z lawyers to attend a LYXJ internal coordination meeting in Shanghai concerning the potential IPO. He stated in a text message circulated to all relevant lawyers at K&Z that “[w]e will discuss legal representation after the meeting.” K&Z flew two lawyers to Shanghai for the meeting. The discussion regarding legal representations never took place, and after the meeting the negotiations between Zou and the law firm were terminated. K&Z sued Zou and XJ for the travel costs of RMB 2552 yuan and fees for legal services of RMB 48,000 yuan.

The trial court and the appellate court (the Third Intermediate Court of Beijing) dismissed the claim against XJ. The negotiations concerned whether K&Z was to represent LYXJ. XJ was not engaged in the negotiation. Neither had XJ received legal services from K&Z.

The trial court dismissed the claim against Zou. The appellate court held that Zou had engaged in conduct that violated good faith according to Article 42(3) because he did not provide a reason for terminating the negotiations. The appellate court was not convinced that there was enough evidence to show that any legal services were performed, and only allowed K&Z to recover the travel costs.

**Yang Fan v. Amazon**, (2017) 京民终1120号 (2017) **Jing Min Zhong No.1120**

On October 29, 2014, plaintiff Yang Fan placed an order on Amazon.cn to purchase two “ECOVACS” Robot Cleaners at the unit price of RMB 94 yuan. The market price for such a product was RMB 947 yuan. Upon placing the order, Yang received an email from Amazon acknowledging that the order has been received and providing an estimate of the arrival time. It also stated that the email only served as an acknowledgement of the receipt of the order but did not constitute an acceptance. Amazon’s Terms of Use provided that the contract between the two parties will only be formed upon Amazon’s confirmation of such an order.

On November 3, in an email to Yang, Amazon stated that they could not fulfill the order because the product was out of stock. Amazon issued the refund soon afterward.

Yang sued for RMB 1710 yuan, the difference between the market price and the sale price and attorney’s fees.

Amazon argued that the price was mistakenly marked at RMB 94. It denied that there was a contract between the two because of the terms in the Terms of Use. According to the Terms, placing an order is only deemed as an

offer and only the acknowledgement email serves as an acceptance. Amazon argued that only reliance damage, which did not exist, can be permitted: absent a contract, expectation damage is not allowed. As an experienced online shopper, Yang should have anticipated that it was a mechanical error when the marked price was only one-tenth of the market price.

Yang argued that a) in the event that there was a contract, Amazon was obligated to perform, or b) Amazon should be liable for *culpa in contrahendo*. In support of his argument, Yang alleged that such a mechanical error has occurred from time to time since 2013 and was created intentionally as part of the sales promotion activities. Moreover, the reliance damage shall include the opportunity lost by the consumer to purchase similar products at the same price.

The trial court found Amazon liable for its fault in contracting under Article 42 of Contract Law and held that it is bound to compensate Yang for the price difference between the sale price and the market price.

The appellate court affirmed the trial court decision. It held that “[t]he contract was not effectively concluded according to Terms of Use. When a contract fails to be concluded, it is void or voidable, and the party at fault shall be held liable. There is a severe information asymmetry between the online platform [Amazon] and the consumer regarding the availability of products in stock. When products are out of stock, the platform operator has the duty to reach out to consumers in time and prevent them from making payment. Availability of special sale discounts is common marketing strategy in online shopping industry. As a consumer, Yang would not be able to tell whether the extremely low pricing was mechanical error or a real promotion deal. It will be detrimental to the regulation of reneging and false promotion if the online platform goes unpunished or is only liable for the loss of interest of the payment when a transaction falls through. Yang made the purchase based on reasonable reliance [on the information] provided by Amazon while Amazon failed to fulfill its duty to manage the website properly. The unilateral cancellation of the order resulted in the loss. It was not improper for the trial court to award the price difference as the compensatory damage.”

**Note.** Consider whether there is a contract between the parties and whether expectation damage is the proper remedy.

In another case, on similar facts, the court reached the same result but held that Amazon’s Terms of Use were not binding. *Chen Wei v. Amazon*, (2014) 三中民终字第09383号. We will return to that case when we consider the validity of unfair terms.

### The Draft Common Frame of Reference

#### ARTICLE II. 3:301: NEGOTIATIONS CONTRARY TO GOOD FAITH AND FAIR DEALING

- (1). A person is free to negotiate and is not liable for failure to reach an agreement.
- (2). A person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing and not to break off negotiations contrary to good faith and fair dealing. This duty may not be excluded or limited by contract.

- (3). A person who is in breach of the duty is liable for any loss caused to the other party by the breach.
- (4). It is contrary to good faith and fair dealing, in particular, for a person to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

### **The Unidroit Principles of International Commercial Contracts**

#### ARTICLE 2.15 NEGOTIATIONS IN BAD FAITH

- (1). A party is free to negotiate and is not liable for failure to reach an agreement.
- (2). However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.
- (3). It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

#### ARTICLE 2.16 DUTY OF CONFIDENTIALITY

Where information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or to use it improperly for its own purposes, whether or not a contract is subsequently concluded. Where appropriate, the remedy for breach of this duty may include compensation based on the benefit received by the other party.

### **3. Mistake**

In modern legal systems, the problem of when a contract is void for mistake is often thought to involve a basic question of contract law. A contract is formed by the consent of the parties. Can the parties truly consent even if one or both of them is mistaken, and if so, when? The question of the effect of mistake on consent was raised by the Roman jurists. Nevertheless, they were not trying to discover general principles underlying contract law. They were concerned with particular problems. The most important passage discussing the problem – written by Ulpian – was buried in a title of the *Digest* that dealt with the law of sales. It uses some high powered philosophical terms in what seems to be a hopelessly vague way, and resolves a number of hypothetical cases:

In contracts of sale there must be consent; the sale is invalid if there is disagreement either as to the fact of sale (*in ipsa emptione*) or the price or any other matter. If therefore I thought I was buying the Cornelian estate and you that you were selling the Sempronian, the sale is void on the ground that we were not at one as to the thing sold (*in corpore*). . . . Then next comes the question whether there is a good sale if there is no mistake as to the identity of the thing (*in corpore*), but there is in regard to its substance (*in substantia*), for example where vinegar is sold for wine, or copper for gold, or lead or something else resembling silver for silver. Marcellus . . . writes that there is a good contract,



because there has been agreement as to the specific thing, though mistake as to the material (*in materia*). I take the same view in the wine case, because the *ousia* [a Greek word meaning essence] is pretty much the same, if the wine has just gone sour; but if it is not wine gone sour, but was in origin a specially prepared vinegar, then it appears that one thing has been sold for another. In the remaining cases, however, I hold that whenever there is a mistake as to material, there is no sale. Dig. 18.1.9.

Accursius, the thirteenth-century jurist who wrote the standard commentary or Ordinary Gloss on the Digest, simply enumerated the types of mistakes that Ulpian mentioned: errors in (1) whether there was a sale, (2) price, (3) *corpore*, (4) *substantia* or *ousia*; and (5) *materia*.<sup>1</sup> In early modern times, the late scholastics and northern natural lawyers tried to develop a theory and systematic doctrine of contract law. As noted earlier, following Aristotle, the late scholastics thought that through contract a party voluntarily entered into either of two basic kinds of arrangements: a gratuitous contract in which he enriched the other party at his own expense, or an onerous contract in which he exchanged his own performance for one of equivalent value. Since either of them had to be voluntary, they asked when a decision truly was voluntary. Aristotle had said in the *Nicomachean Ethics* that an action would be involuntary if a person was mistaken as to what he was doing.<sup>2</sup> That conclusion fit in with his view that a human being was an animal who acts by understanding. If he acts without understanding what he is doing, the action cannot be one he has chosen. For Aristotle, moreover, a thing is what it is because it has a certain “substance,” “substantial form,” or “essence.” A human being has one essence, a lion has another. When it loses its substantial form or essence it is no longer what it was before – as when a tree is burned to ashes – but it can change its “accidental form” or “accidents” while remaining the same thing – as when a tree grows taller. The late scholastics concluded that there was one sort of mistake that made a contract involuntary: a mistake as to the substance or substantial form or essence of what one was doing. By and large, the natural lawyers agreed. It became a commonplace that error in substance voids a contract.

It was easier for the late scholastics and the natural lawyers to read this conclusion into Roman law because mistake in substance (*substantia*) and essence (*ousia*) were mentioned in the Roman text quoted earlier. Indeed, medieval jurists who admired Aristotle such as Bartolus of Saxoferrato and Baldus de Ubaldis had already read an Aristotelian meaning into the Roman text quoted earlier. For Bartolus, error in *substantia* meant error in substance as Aristotle had understood it. Baldus regarded this as the basic type of error.

1. Accursius, *Glossa ordinaria* (1581), to Dig. 18.1.9 to *aliquo alio*. Actually, he had a sixth category as well: error in “sex.” That category was based on D. 18.1.11.1, which said that the buyer of a slave could void the sale if he mistakenly thought that

the slave was male but not if he knew she was female but mistakenly thought she was a virgin.

2. *Nicomachean Ethics* III.i 1110<sup>a</sup>–1111<sup>b</sup>.



Of course, it was one thing to say that a contract was void for an error in substance and another to explain what this phrase might mean. The problem was not so hard in the case of “artifacts”: man-made things. In Aristotelian philosophy, the essence of a thing was captured by its definition, and an artifact was defined in terms of the purpose for which it was made. But what about natural things? In the following passage, Bartolus seems to suggest that what matters is not necessarily what a biologist or a geologist would take to be their essence:

One and the same thing is taken in different ways according to a difference in the way it is considered, as will now be seen. A field may be considered with regard to its matter, which is earth, and then if a river makes a channel through it, it does not cease to be earth, and so the earth remains something of the same kind. It can also be considered as earth suitable for the driving (*agi*) of animals, that is, earth on which animals are led and can labor, and it is from this use that “field” (*ager*) receives the name which is proper to it . . . Taken in this way, it loses its proper form [if the river makes channels through it] . . . It is much the same with the wine. If it is made vinegar, it is still of the same substance insofar as its matter is considered. Properly considered, however, it is not wine but another kind of thing, and it does not come under the name “wine.”<sup>3</sup>

Centuries later, Pufendorf was to express a similar idea: what mattered was the “substance” of a thing as it would be considered from the standpoint of the parties.

Explaining the Roman cases proved considerably harder. For example, why should it matter whether the vinegar bought for wine was wine that had accidentally soured or wine that was deliberately soured in order to make vinegar? But Ulpian said the sale was valid in the first case but not the second.

In any event phrases such as error in substance or essence outlasted the popularity of Aristotelian philosophy. They found their way into the French and German Civil Codes.

### a. The Search for a Rule

#### French Civil Code

##### ARTICLE 1130

Mistake, fraud and duress vitiate consent where they are of such a nature that, without them, one of the parties would not have contracted or would have contracted on substantially different terms. Their decisive character is assessed in the light of the person and of the circumstances in which consent was given.

3. Bartolus, *Tractatus de alveo*, in *Omnia quae extant opera* (1615), § *Stricta ratione*, nos. 6–7. The derivation of *ager* (field) from *ago* (drive) is given by Varro, *De lingua latina* 34 (Cambridge edn., 1977), 32.

## ARTICLE 1131

Defects in consent are a ground of relative nullity of the contract.

## ARTICLE 1132

Mistake of law or of fact, as long as it is not inexcusable, is a ground of nullity of the contract where it bears on the essential qualities (*qualités essentielles*) of the act of performance owed or of the other contracting party.

## ARTICLE 1133

The essential qualities of the act of performance are those which have been expressly or impliedly agreed and which the parties took into consideration on contracting. Mistake is a ground of nullity whether it bears on the act of performance of one party or of the other.

Acceptance of a risk about a quality of the act of performance rules out mistake in relation to this quality.

## ARTICLE 1134

Mistake about the essential qualities of the other contracting party is a ground of nullity only as regards contracts entered into on the basis of considerations personal to the party.

## ARTICLE 1135

Mistake about mere motive, extraneous to the essential qualities of the act of performance owed or of the other contracting party is not a ground of nullity unless the parties have expressly made it a decisive element of their consent. However, mistake about the motive for an act of generosity is a ground of nullity where, but for the mistake, the donor would not have made it.

**Note.** These articles were added to the Code by Ordonnance no. 2016–131 of February 10, 2016. Previously, the Code provided that “mistake is only a cause of the invalidity of an agreement when it concerns the substance (*substance*) of the thing which is its object” (art. 1110).

## German Civil Code

### § 119 VOIDABILITY DUE TO ERROR

- (1). One who was in error as to the content of his declaration of will or did not wish to make a declaration of will with this content can void the declaration when it is established that he would not have made it with knowledge of the state of affairs and intelligent appreciation of the case.
- (2). A mistake over any characteristics of the person or thing that are regarded as essential in ordinary dealings counts as an error in the content of the declaration.

Similar expressions found their way into Anglo-American treatises and cases. See *Sherwood v. Walker*, below (“A barren cow is substantially a different creature than a breeding one”). Few if any French, German, or American jurists have a clear idea of what an error in

“substance” or in an “essential” characteristic really means. In the United States, the Restatement (Second) of Contracts tried to add clarity by speaking not of a mistake in “substance” but of one in “basic assumption.”

### Restatement (Second) of Contracts

#### § 152 WHEN MISTAKE OF BOTH PARTIES MAKES A CONTRACT VOIDABLE

- (1). Where a mistake of both parties at the time the contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party [unless that party bears the risk, as described in a later section.]

**Note.** Whether the expression “basic assumption” adds clarity may be judged by the official comments to this section:

*b. Basic assumption.* A mistake of both parties does not make the contract voidable unless it is a basic assumption on which both parties made the contract . . . [M]arket conditions and the financial situation of the parties are ordinarily not such assumptions . . . The parties may have had such a “basic assumption,” even if they were not conscious of alternatives . . . Where, for example, a party purchases an annuity on the life of another person, it can be said that it was a basic assumption that the other person was alive at the time, even though the parties never consciously addressed themselves to the possibility that he was dead.

Thus we arrive at the curious rule that an assumption must be basic, although it need not be basic even if it is of great importance to the parties, and that the parties must have made an assumption, even if they never did so consciously.

### Chinese Civil Code

#### ARTICLE 147

A civil juristic act that was based on gross misconception is subject to rescission by people’s court or arbitration institutions at the request of the actor.

### Supreme Court of the People’s Republic of China, Opinions on General Principles of Civil Law (1988)

#### ARTICLE 71

Gross misconception can be found when an actor acted on the mismatch between his will and the declaration of his will and caused severe loss. Such a mismatch is due to actor’s misconception about the nature of his conduct, the identity of the other party, kind, quality, specification and quantity of the object.

**Note.** The General Principles of Civil Law (GPCL) was enacted in 1986 as an all-embrasive mini-Civil Code. It only contains 156 articles, which

cover all areas of civil law. Beyond doubt, there are doctrinal vacuums that needed to be addressed by more detailed rules. In 1988, the Supreme Court issued its opinions on the application of GPCL to fill the gaps in the GPCL. The section just quoted is a prime example of the work of the Opinions: it provides a doctrinal definition on what is a mistake that can be remedied by law.

**Han Shiyuan, *The Law of Contract* (Beijing, 2018), 263**

“Since it was first adopted, gross misconception, as a concept, was never limited to the narrow scenario of mistake or misunderstanding. The concept encompasses mistake as to a party’s identity, a misunderstanding of the nature of the civil juristic act and a mistake about the object.”

**The Draft Common Frame of Reference**

ARTICLE II. 7:201: MISTAKE

- (1). A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:
  - (a). the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different terms and the other party knew or could reasonably be expected to have known this; and
  - (b). the other party
    - (i). caused the mistake;
    - (ii). caused the contract to be concluded in mistake by leaving the mistaken party in error, contrary to good faith and fair dealing, when the other party knew or could reasonably be expected to have known of the mistake;
    - (iii). caused the contract to be concluded in mistake by failing to comply with a pre-contractual information duty or a duty to make available a means of correcting input errors; or
    - (iv). made the same mistake.
- (2). However a party may not avoid the contract for mistake if:
  - (a). the mistake was inexcusable in the circumstances; or
  - (b). the risk of the mistake was assumed, or in the circumstances should be borne, by that party.

**The Unidroit Principles of International Commercial Contracts**

ARTICLE 3.4 DEFINITION OF MISTAKE

Mistake is an erroneous assumption relating to facts or to law existing when the contract was concluded.

ARTICLE 3.5 RELEVANT MISTAKE

- (1). A party may only avoid the contract for mistake if, when the contract was concluded, the mistake was of such importance

that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been known, and

- (a). the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or
  - (b). the other party had not at the time of avoidance acted in reliance on the contract.
- (2). However, a party may not avoid the contract if
- (a). it was grossly negligent in committing the mistake; or
  - (b). the mistake relates to a matter in regard to which the risk of mistake was assumed or, having regard to the circumstances, should be borne by the mistaken party.

## **b. When Relief Is Granted**

### **i. Mistakes in Authenticity**

#### **Leaf v. International Galleries, [1950] 2 K.B. 86**

“In 1944 the defendants sold to the plaintiff for £ 85 a picture which they represented to have been painted by J. Constable. In 1949 the plaintiff tried to sell it at Christies and was then informed that it had not been painted by Constable.” It was found at trial that the painting was not by Constable, but that the defendant had believed that it was.

Denning, L.J. “There was a mistake about the quality of the subject-matter because both parties believed the picture to be a Constable; and that mistake was in one sense essential or fundamental. But such a mistake does not avoid the contract: there was no mistake at all about the subject-matter of the sale. It was a specific picture, ‘Salisbury Cathedral.’ The parties were agreed in the same terms on the same subject-matter, and that is sufficient to make a contract [citation omitted].

There was a term in the contract as to the quality of the subject-matter: namely as to the person by whom the picture was painted – that it was by Constable . . . I think it is right to assume in the buyer’s favour that this term was a condition, and that, if he had come in proper time he could have rejected the picture; but the right to reject for breach of condition has always been limited by the rule that, once the buyer has accepted the goods in performance of the contract, then he cannot thereafter reject but is relegated to his claim for damages [citations omitted].

The circumstances in which a buyer is deemed to have accepted goods in performance of the contract are set out in s. 35 of the [Sale of Goods Act, 1893], which says that the buyer is deemed to have accepted the goods, amongst other things, ‘when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.’ In this case, the buyer took the picture into his house and,

apparently, hung it there, and five years passed before he intimated any rejection at all . . . His remedy . . . is for damages only, a claim which he has not brought before the court. Is it to be said that the buyer is in any better position by relying on the representation, not as a condition, but as an innocent misrepresentation. I agree that on a contract for the sale of goods an innocent material misrepresentation may, in a proper case, be a ground for rescission even after the contract has been executed [citing, *inter alia*, *Bell v. Lever Bros. Ltd.*] . . .

Although rescission may in some cases be a proper remedy, it is to be remembered that an innocent misrepresentation is much less potent than a breach of condition; and a claim to rescission for innocent misrepresentation must at any rate be barred when a right to reject for breach of condition is barred.”

**Smith v. Zimbalist, 38 P.2d 170 (Cal. App. 1934)**

Zimbalist, an internationally known violinist, agreed to pay \$8,000 for two violins from Smith, a collector, calling one a “Stradivarius” and the other a “Guanerius.” It turned out that the violins were not made by Antonius Stradivarius or Josef Guanerius but were cheap imitations worth not more than \$300. Zimbalist sued successfully to avoid the contract on the grounds of both mutual mistake and breach of express warranty.

**Firestone & Parson, Inc. v. Union League of Philadelphia, 672 F. Supp. 819 (E.D. Pa. 1987)**

In 1981, the Union League Club sold Firestone and Parson an oil painting for \$500,000 which was generally believed in art circles to be by Albert Bierstadt, an American landscape painter. In 1985, some art historians began to doubt its authenticity. In 1986, an article published in *Antiques* magazine ascribed it to another artist, John Ross Key. That view became generally accepted among experts. If it had been painted by Key, it was worth only about \$50,000. In 1988, the Firestone & Parsons company brought suit to rescind the contract. The court held that it could not. “[I]n the arcane world of high-priced art, market value is affected by market perceptions; the market value of a painting is determined by the prevailing views of the marketplace concerning its attribution. Post-sale fluctuations in generally accepted attributions do not necessarily establish that there was a mutual mistake of fact at the time of the sale.”

**Cour de cassation, 1<sup>e</sup> ch. civ., February 23, 1970, J.C.P. 1970.J.16347**

Chalom bought two chairs described as “marquises” of the Louis XV period at a public auction from the couple *Lièvre-Aubin de la Messuzière*. After they were dismantled and scraped, they proved to be chairs of another type – “bergères” – which had been “adroitly reconstructed with pieces from the period of Louis XV and of the period following.” The *Cour de cassation* held that the lower court was correct to annul the sale for mistake, noting that “the sale can be declared invalid although the object has preserved its individuality and its specific qualities.”

**Cour de cassation, 1<sup>e</sup> ch. civ., March 24, 1987, J.C.P. 1989.J.21300**

In 1933, before his death, Sean-André Vincent sold a painting at a public auction entitled *Le Verrou* as being “attributed to Fragonard.” After it had been recognized that the painting truly was by Fragonard, the heirs of Vincent sued to have the sale annulled on the ground that Vincent had been in error as to its authenticity. The *Cour de cassation* refused to annul the sale. It said that the court below had found “that in 1933, in buying or in selling a work attributed to Fragonard the contracting parties had accepted the risk as to the authenticity of the work.”

**Cour d’appel, Paris, September 23, 1988, Rev. trim. dr. civ. 1989.741**

The buyer of a used car discovered that it was first sold in 1955 although the sales catalog described it as a “Rolls Royce, 26 CV, 1954 Silver Wraith model.” The court refused to annul the sale for error. It said that “supposing that one has been established, an error as to the year of fabrication would not justify annulling the contract unless the buyer proved that it concerned a substantial characteristic of the object.” “[S]ince the matter concerns a vehicle which is a collectors’ item, its age, attested by the year it was made, certainly does constitute a determining criterion for the sale, [but], nevertheless, the authenticity of a collectors’ item is subject to nuances [and] the exactness of a date close to the date of fabrication of an old car would not constitute a *sine qua non* condition of its acquisition in the opinion of collectors as long as no change had been made that really differentiated the vehicles of one year from those of the next, as is the case here . . . .”

**Reichsgericht, February 22, 1929, RGZ 124, 115**

“In the spring of 1925, Frau F. had her husband deliver two Chinese vases to store W. to be sold on commission. This firm with the owner’s agreement placed the vases on sale in its department for modern Chinese and Japanese goods. On August 1, 1925, the defendant bought them there for the price requested which was 390 Reichsmarks. He immediately sold them in Holland at a large profit (the plaintiff claims for 1,500 Dutch guilders). At an auction organized by the Dutch purchaser, they were sold to the Kensington Museum in London in return for 200,000 Reichsmarks. The lawyer Dr. T. served written notice on November 19, 1925, on behalf of the interested parties – the former owner and the commission broker – that the contract was void on account of error since these parties were of the opinion at the time the contract was concluded that the pieces were from the beginning of the 19th century when, in fact, the vases were from the time of the Ming dynasty (1380–1644) in which the Chinese empire saw its greatest flowering of art. In his notice he also declared that the defendant was obligated to redeliver the vases or, if that were impossible, to make compensation for their value or at least to pay the net proceeds just described to the interested parties . . . .

The rarity which is due to the age of a thing is to be considered a characteristic of the thing. There is no doubt that both vases had a value on account of their rarity in this sense. Firm W. was in error concerning this value . . .



The decision under appeal is reversed and the matter is remanded to the lower court. In the future proceedings, the following point is to be given attention. As the appellate court correctly observed, ... Frau F. cannot make a claim on the basis of an error of the commission broker if she herself was not in error. A finding must be made on whether at the time the contract was concluded, she or her husband, who carried on the transaction with Firm W., took into account the possibility that the object originated centuries ago and had a particular value because of its rarity, and whether, had they been aware of this possibility, the contract for sale by commission at the price in question would not have been concluded."

**Reichsgericht, March 11, 1932, RGZ 135, 339**

"On 18 January 1928, the plaintiff bought an oil painting from the defendant, 'Ice on Water,' which was indicated to him as an original painting of Jacob I. (Isaakson) van Ruysdael and accompanied by an opinion by the late museum director B. attesting, as the parties understood, that the work originated with this painter. The picture was immediately delivered and the purchase price of 15,000 Reichsmarks was paid. The plaintiff claims that the work was done not by 'the famous master' Jacob I. van Ruysdael but by his 'much less famous cousin and imitator' Jacob S. (Solomonsson) van Ruysdael. Accordingly, on October 18, 1929, he claimed that the contract of sale was void for mistake and demanded the return of the purchase price with interest. Both lower courts rejected his claim. The plaintiff's appeal (*Revision*) is to be rejected on the following grounds ... Naturally, one cannot speak of a defect in the painting and warranty, nor of an error and voidability in a speculative acquisition where the seller does not give any guarantee (and it is not found that he did here) but perhaps expressly refused to do so, and the buyer himself takes into account that the picture can be by someone other than the designated master, for example, a pupil, and buys it only in hopes that the opinion of the parties will prove to be correct. In such a case it is even true that the characteristic of the thing – its production by a certain master – is contractually presumed, be it known in commerce with a greater or lesser degree of certainty."

**Lu v. Hu, (2011) 白民初字第2694号 [(2011) Bai Min Chu Zi No. 2694]**

The seller, Lu Xianfang, sued for the 1.2 million yuan that remained of a sale price of 1.3 million yuan. The buyer, Hu Demin, purchased four Buddhist sculptures, one jade Guanyin for 700,000 yuan and a set of three statues of the Western Trinity [Shakyamuni Buddha, Amitabha Buddha and Bhaisajya Guru Buddha] for 200,000 yuan apiece. The buyer refused to pay and asked to have the contract rescinded on the ground of gross misconception. The buyer argued that he was told by a collector friend who was present at the sale that all the four pieces are antiques from Tang Dynasty and Ming Dynasty. The after-sale appraisal revealed that all four pieces were modern replicas. In addition, the material of the "jade" Guanyin was actually marble.

The seller argued that he "never made the promise that those four pieces were antiques." Further, he "did not make the representation that

the jade Guanyin was made of jade. In the business of trading in collectables, the custom is that items for sale are to be inspected at the time of sale. Artwork is generally sold 'as is.' Once sold, items cannot be returned. The buyer should have known better given his twenty-year experience dealing in collectables."

The court held that a "mistake about time of creation of artworks and antiques is generally not a mistake that can be remedied by law." The court reasoned that "[i]t is the custom in the trade of artworks, antiques and jewelries that sellers do not make declarations about qualities such as the nature of material and the age of the items in the contract. It is for the buyer to inspect them and to make his own judgment. Nevertheless, the contract regarding jade Guanyin ought to be rescinded given the fact that it was described in the contract as 'jade Guanyin.' During the trial, the plaintiff declared that the statue was made of jade. It can be inferred that a representation that the statue was made of jade must have been made by the plaintiff during the transaction. Such a representation directly affected [the fulfillment of] the purpose of the contract and [caused] a severe loss. Consequently, such, gross misconception avoids the contract."

The court allowed the partial contract with regard to the sale of Guanyin to be rescinded but the part of the agreement concerning the three-piece set of the Western Trinity stands.

## **ii. Mistakes in Suitability for a Purpose**

### **Griffith v. Brymer, (1903) 19 T.L.R. 434 (K.B.)**

At 11:00 A.M., June 24, 1902, plaintiff agreed to rent a flat from defendant for one day to view the coronation procession of King Edward VII, and paid £100. The parties were unaware that an hour earlier a decision had been made to operate on the king, which made the procession impossible. Held: the contract was void, and plaintiff is entitled to rescission: "The agreement was made on the supposition by both parties that nothing had happened which made performance impossible. This was a misapprehension of the state of facts which went to the whole root of the matter."

### **Amalgamated Investment & Property Co. Ltd. v. John Walker & Sons, Ltd., [1977] 1 W.L.R. 164 (C.A.)**

"In July 1973, the plaintiff purchasers agreed to purchase the freehold of a warehouse from the defendant vendors for £1,700,000 subject to contract. The warehouse had been advertised as being suitable for redevelopment and during the negotiations, the purchasers inquired whether the property had been designated as a building of 'special architectural or historic interest' and the vendors replied in the negative. On September 25, the parties signed the contract . . . The following day, September 26, the Department of Environment wrote to the vendors informing them that the property had been selected for inclusion in the statutory list of buildings of 'special architectural or historic interest' and, on September 27, the list was signed on behalf of the Secretary of State." Held: the contract is not void for mistake.

Buckley, L.J. "For the application of the doctrine of mutual mistake as a ground for setting the contract aside, it is of course necessary to show that the mistake existed at the date of the contract; and so Mr. Balcombe [attorney for the buyers] relies in that respect not upon the signing of the list by the officer who alone was authorized to sign it on behalf of the Secretary of State, but upon the decision of Miss Price that the list should contain the particular property with which we are concerned. That decision, although in fact it led to the signature of the list in the form in which it was eventually signed, was merely an administrative step in the carrying out of the operations of the branch of the ministry. It was a personal decision on the part of Miss Price that the list should contain the particular property with which we are concerned. But there was still the possibility that something else might arise before the list was signed . . . The crucial date, in my judgment, is the date when the list was signed."

**Sherwood v. Walker, 33 N.W. 919 (Mich. 1887)**

"The main controversy depends upon the construction of a contract for the sale of a cow.

The defendants . . . introduced evidence tending to show that at the time of the alleged sale it was believed by both the plaintiff and themselves that the cow was barren and would not breed; that she cost \$850, and if not barren would be worth from \$750 to \$1,000; that after the date of the letter, and the order to Graham, the defendants were informed by said Graham that in his judgment the cow was with calf, and therefore they instructed him not to deliver her to plaintiff . . .

It appears from the record that both parties supposed this cow was barren and would not breed, and she was sold by the pound for an insignificant sum [\$80] as compared with her real value if a breeder . . .

If there is a difference or misapprehension as to the substance of the thing bargained for; if the thing actually delivered or received is different in substance from the thing bargained for, and intended to be sold, then there is no contract; but if it be only a difference in some quality or accident, even though the mistake may have been the actuating motive to the purchaser or seller, or both of them, yet the contract remains binding . . .

It seems to me . . . in the case made by this record, that the mistake or misapprehension of the parties went to the whole substance of the agreement. If the cow was a breeder, she was worth at least \$750; if barren, she was worth not over \$80. The parties would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding, and of no use as a cow. It is true she is now the identical animal that they thought her to be when the contract was made; there is no mistake as to the identity of the creature. Yet the mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one. There is as much difference between them for all purposes of use as there is between an ox and a cow that is capable of breeding and giving milk. If the mutual mistake had simply related to the fact whether she was with calf or not for one season, then it might have been a good sale, but the

mistake affected the substance of the whole consideration, and it must be considered that there was no contract to sell or sale of the cow as she actually was. The thing sold and bought had in fact no existence. She was sold as a beef creature would be sold; she is in fact a breeding cow, and a valuable one."

Sherwood, J. dissenting: "I do not concur in the opinion given by my brethren in this case . . .

[T]he buyer purchased her believing her to be of the breed represented by the sellers, and possessing all the qualities stated, and even more. He believed she would breed. There is no pretense that the plaintiff bought the cow for beef, and there is nothing in the record indicating that he would have bought her at all only that he thought she might be made to breed. Under the foregoing facts, – and these are all that are contained in the record material to the contract, – it is held that because it turned out that the plaintiff was more correct in his judgment as to one quality of the cow than the defendants, and a quality, too, which could not by any possibility be positively known at the time by either party to exist, the contract may be annulled by the defendants at their pleasure. I know of no law, and have not been referred to any, which will justify any such holding, and I think the circuit judge was right in his construction of the contract between parties."

**Lenawee County Board of Health v. Messerly, 331 N.W.2d 203 (Mich. 1982)**

Carl and Nancy Pickles bought a 600 square foot tract of land from William and Martha Messerly on which was a three unit apartment building. Shortly after, the Lenawee County Board of Health condemned the property and obtained a permanent injunction prohibiting human habitation on the grounds that the sewage system violated the sanitation code. The sanitation system had been installed by Messerly's predecessor in title, and they were unaware of its condition. The Pickles agreed to pay \$25,500 for the land. Because of its condition, the land had no value at all. The contract contained a clause which said, "Purchaser has examined the property and agrees to accept it in its present condition."

"We find that the inexact and confusing distinction between mistakes running to value and those touching the substance of the consideration serves only as an impediment to a clear and helpful analysis for the equitable resolution of cases in which mistake is alleged and proven. Accordingly, the holdings of *A & M Land Development Co.* and *Sherwood* with respect to the material or collateral nature of a mistake are limited to the facts of those cases.

Instead, we think the better-reasoned approach is a case-by-case analysis whereby rescission is indicated when the mistaken belief relates to a basic assumption of the parties upon which the contract is made, and which materially affects the agreed performances of the parties [citations omitted].

All of the parties to this contract erroneously assumed that the property transferred by the vendors to the vendees was suitable for human habitation and could be utilized to generate rental income. The

fundamental nature of these assumptions is indicated by the fact that their invalidity changed the character of the property transferred, thereby frustrating, indeed, precluding, Mr. and Mrs. Pickles's intended use of the real estate . . .

Despite the significance of the mistake made by the parties, we reverse the Court of Appeals because we conclude that equity does not justify the remedy sought by Mr. and Mrs. Pickles . . .

Equity suggests that, in this case, the risk should be allocated to the purchasers . . . . While there is no express assumption in the contract by either party of the risk of the property becoming uninhabitable, there was indeed some agreed allocation of the risk to the vendees by the incorporation of an 'as is' clause into the contract . . . ."

**Cour d'appel, Versailles, March 30, 1989, Rev. trim. dr. civ. 1989. 739**

The couple D. contracted to buy real estate belonging to the couple B. for a price of 645,000 francs. They claimed that they later learned that a highway was to be built fifty meters away. The court granted their request that the sale be avoided for error "considering the discovery by the buyers, after their commitment, of the construction project already mentioned and the potential for noise and which manifestly changed the possibility of normal enjoyment of a habitation given that the sale included a wooded park."

**iii. Mistakes in Value**

**Kennedy v. The Panama, New Zealand, and Australian Royal Mail Co., [1867] 2 Q.B. 580**

Plaintiff was induced to buy shares of stock from defendant in defendant company by a statement in its prospectus that it had a contract with the government of New Zealand to carry mail. While the company believed it had such contract, in fact it did not, since the agent that had signed on behalf of the government had no authority to do so, and the government refused to ratify the contract, although it eventually agreed to a contract on somewhat different terms. Plaintiff sued for rescission.

Blackburn, J. "[W]here there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to shew that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent misrepresentation as the horse's soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse and were in error, yet the purchaser must pay the whole price, unless there was a warranty . . .

The principle is well illustrated in the civil law [quoting at length from Digest 18.1.9, reproduced above], and the answers given by the great jurists are to the effect that if there be misapprehension as to the

substance of the thing there is no contract; but if it be only a difference in some quality or accident, even though the misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding ...

[W]e do not think that [the misstatement in this case] affected the substance of the matter, for the applicant actually got shares in the very company for shares in which he had applied; and that company has, by means of the invalid contract, got the benefit, and is now carrying the mails on terms, not the same as those they supposed, but still on profitable terms ...”

**Bell v. Lever Brothers, Ltd., [1932] A.C. 161 (1932) (H.L.)**

Lever Brothers hired the defendants to be chairman and vice chairman of a subsidiary for a period of years. When the subsidiary merged with another company, and it became necessary to terminate them, Lever Brothers agreed to pay them £20,000 and £30,000 respectively, in compensation. It then discovered that they had violated their duties by secretly speculating in cocoa, and that it would have had the right to terminate their contracts without compensation because of this breach of duty. Held (by a narrow margin) that the contracts for compensation are valid.

Lord Atkin. “[A] mistake [as to quality of the thing contracted for] will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be ...

[Here,] [t]he contract released is the identical contract in both cases, and the party paying for release gets exactly what he bargains for. It seems immaterial that he could have got the same result in another way, or that if he had known the true facts he would not have entered into the bargain. A. buys B.’s horse; he thinks the horse is sound and he pays the price of a sound horse ... A. is bound and cannot recover back the price. A. buys a picture from B.; both A. and B. believe it to be the work of an old master, and a high price is paid. It turns out to be a modern copy. A. has no remedy in the absence of representation or warranty. A. agrees to take on lease or to buy from B. an unfurnished dwelling-house. The house is in fact uninhabitable. A. would never have entered into the bargain if he had known the fact. A. has no remedy ... A. buys a roadside garage business from B. abutting on a public thoroughfare: unknown to A., but known to B., it has already been decided to construct a bypass road which will divert substantially the whole of the traffic from passing A.’s garage. Again, A. has no remedy.”

**Cour d’appel, Riom, May 10, 1988, Rev. trim. dr. civ. 1989.740**

The *Société d’équipement d’Auvergne* sold land for which a building permit had been obtained to the *Société H.L.M. Carpi*. During construction work, a shifting of the earth was observed. After a geological study was made, it appeared that only twenty-two individual houses could be built instead of the thirty-two which the *Société Carpi* had intended. The court refused to annul the contract for mistake. It noted that “the sale was concluded among companies which were professionals quite aware of



problems of land and of construction,” and “the parties stipulated [in their contract] that the buyer ‘will take the land sold in its state as of the day he enters into enjoyment of it without power to have any recourse or rescission against the seller for any reason whatever, and in particular, on account of the bad state of the soil or sub-soil, digging, or excavation.’”

**Jiang Yan v. Jiangsu Auction House et al., (2010)**钟民初字第0274号(2010)常民终字第1356号; **(2012)**苏民监字第026号; **(2012) Su Min Jian Zi No. 026**

Plaintiff won a public bidding for an apartment from the defendant. The apartment was listed as one with 3600 square meters in area and the plaintiff's winning bid was 45.6 million yuan. She filed the lawsuit to reduce the contract price and the commissions charged by the auction house because the actual area turned out to be only 3015.75 square meters. The district court held that the difference of 584.24 square meters was beyond the normal scope of error of margin and allowed the contract price and commissions to be reduced pro rata. The appellate court overruled the trial court decision. They did not think it was a mistake as to the quality of the house but a mistake resulted from a mismatch between the description of the item and the item itself. As such, plaintiff could choose to avoid the contract and receive a total refund. Her claim to reduce the contract price, however, cannot be supported. This decision was affirmed by Jiangsu provincial high court. The high court reasoned that “[i]t would be unfair to other potential bidders to simply reduce the contract price pro rata because it is impossible to ascertain the actual bidding price simply by calculating the area. The proper bidding price could only be ascertained through a new auction.”

### III. FAIRNESS

#### 1. Fairness of the Price Term

##### a. Origins

##### Civil Law

Classical Roman law did not require that a price be fair.<sup>1</sup> As one text said, in a sale: “it is permitted by nature for one party to buy for less and other to sell for more, and thus each is allowed to outwit the other.”<sup>2</sup> In the late empire, however, a text attributed to Diocletian, but possibly added by Justinian, gave a remedy to one who sold land for less than half the “just price.” The buyer had either to rescind the transaction or to make up the difference between the price paid and the “just price.”<sup>3</sup> At a very early date, the medieval jurists interpreted this text to apply to buyers as well as sellers and to parties to analogous contracts.<sup>4</sup> So they created a generalized

1. Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990), 255–6.

2. Dig. 19.2.22.3. See also Dig. 4.4.16.4.

3. C. 4.44.2; C. 4.44.8. See Zimmermann, *Law of Obligations*, 259–61; Hackl, “Zu dem

Wurzeln der Anfechtung wegen laesio enormis,” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Rom. Abt. 98 (1981), 147–61.

4. *The Brachylogus*, written at the beginning of the twelfth century, does not



remedy for a very unfair price – for what came to be called *laesio enormis*, literally, a very large hurt.

They identified the just price with the price for which goods were sold commonly, a price that differed from day to day and region to region.<sup>5</sup> As Accursius noted, one who sold an object for less than half the amount he paid for it might not be entitled to relief since “it could be . . . that when the sale of the object to him occurred, it was worth more than when he now sells.”<sup>6</sup> They had no theory to explain why the market price was fair.

Again, an explanation was developed by the late scholastics in the sixteenth century based on the ideas of Aristotle and Thomas Aquinas. Commutative justice preserved the distribution of wealth among citizens. In the case of “voluntary commutative justice,” the parties exchanged resources of equal value so that neither was enriched.<sup>7</sup> According to Thomas Aquinas, this principle explained the remedy for *laesio enormis*. While in principle, every deviation from the just price was wrong, relief was given only for large deviations because the law cannot remedy every evil.<sup>8</sup> The late scholastics adopted this explanation. For the most part, the northern natural lawyers of the seventeenth and eighteenth century followed them. At least, they usually explained the remedy by saying that exchange required equality, even those who felt little or no allegiance to Aristotelian philosophy.

Like the medieval jurists, they identified the just price that preserved equality with the market price.<sup>9</sup> Soto, Molina, and Lessius explained in the sixteenth century, and Grotius and Pufendorf in the seventeenth, that if no price is set by public authority, the just price is the price for which goods are commonly traded as long as there are no monopolies. Therefore the just price varies from day to day and region to region. It depends, not only on the cost of production, but also on the need for the goods and on their scarcity.<sup>10</sup> As Odd Langholm has noted, the late scholastics were hardly

speak of land but of objects sold. *Brachylogus* (1743) III.xiii.8. *Dissensiones dominorum* of the early thirteenth century reports a dispute in which all participants take it for granted that the buyer as well as the seller has a remedy. The dispute is over whether to be entitled to the remedy the buyer must have paid twice or one and a half times the just price. The participants are said to be Placentinus and Albericus, who wrote in the twelfth century, and Martinus, a student of Irnerius. Hugolinus de Presbyteris, *Diversitates sive dissensiones dominorum super toto corpore iure civilis* (ed. Haenel, 1834), § 253.

5. Accursius, *Glossa ordinaria* (1581), to Dig. 13.4.3 to varia.

6. Accursius, *Glossa ordinaria* to C. 4.44.4 to *autoritate iudicis*.

7. Aristotle, *Nichomachean Ethics* V.iii 1131<sup>a</sup>; Thomas Aquinas, *Summa theologiae* II-II, Q. 61, a. 2–3.

8. *Ibid.* a. 3.

9. John Noonan, *The Scholastic Analysis of Usury* (1957), 82–8; Raymond de Roover, “The Concept of the Just Price Theory and Economic Policy,” *J. Economic History* 18 (1958), 418–34; Ambrosetti, “Diritto privato ed economia nella seconda scolastica,” in *La seconda scolastica nella formazione del diritto privato moderno* (Paolo Grossi, ed., 1973), 23–52, 28.

10. Domenicus Soto, *De iustitia et iure libri decem* (1553), lib. 6, q. 2, a. 3; Ludovicus Molina, *De iustitia et iure tractatus* (1614), disp. 348; Leonardus Lessius, *De iustitia et iure, ceterisque virtutibus cardinalis* (1628), lib. 2, cap. 21, dub. 4; Hugo Grotius, *De iure belli ac pacis libri tres* (1646), II.xii.14; Samuel Pufendorf, *De iustitia naturae ac gentium* (1688), V.i.6. See Paulo Cappellini, *Schemi contrattuali e cultura teologicogiuridico nella seconda scolastica: verso una teoria generale* (thesis, Univ. Firenze, 1978/79), 184–96.

being original since all three factors had been mentioned continually in medieval commentaries to Aristotle's *Ethics*.<sup>11</sup> For that matter, all three had been mentioned, albeit cryptically, by Aquinas.<sup>12</sup> The writers in this tradition did not, as some scholars once imagined, identify the just price with the cost of production.<sup>13</sup> They thought, then, that an exchange at the market price preserved equality even though they knew that the seller would sometimes recover more or less than his costs. They may have thought such a price was as equal as possible given that prices must fluctuate to take account of need and scarcity. Any inequalities caused by the market price had to be tolerated. In contrast, one did not need to tolerate inequalities which arose when, as Lessius put it, one party took advantage of another's "ignorance" or "necessity" to sell to him for more than the market price or to buy from him for less.<sup>14</sup> Also, the seller who lost if market prices had fallen could just as easily have gained if they had risen. Thus that transaction would be equal in the sense that a bet is fair when each party has an equal risk of gain and loss. As Soto said, a merchant must suffer a loss if "bad fortune buffets him, for example, because an unexpected abundance of goods mounts up," and conversely, if "fortune smiles on him" he may keep the gain "for as the business of buying and selling is subject to fortuitous events of many kinds, merchants ought to bear risks at their own expense, and on the other hand, they may wait for good fortune."<sup>15</sup> In the seventeenth and eighteenth centuries, the French, Dutch, and German jurists who wrote about positive law explained the remedy available in their countries by saying, like the natural lawyers, that a contract must be made at a just price. They did not change positive law. German and Dutch jurists said, like the medieval jurists, that the buyer as well as the seller could receive a remedy, as could the parties to similar types of contracts.<sup>16</sup> French jurists preserved a traditional French rule which, like the original Roman text, limited relief to the seller of land.<sup>17</sup> Nevertheless, though they continued to repeat the

11. Odd Langholm, *Price and Value in the Aristotelian Tradition* (1979), 61–143.

12. Thomas Aquinas, *In decem libros Ethicorum Aristotelis ad Nicomachum Expositio* (A. Pirotta, ed., 1934), lib. 5, lec. 9 (mentioning labor and expenses and *indigentia* or need); *Summa theologiae* II-II, q. 77 a. 3 ad 4 (permitting a sale at famine prices).

13. E.g., Hagenauer, *Das "justum pretium" bei Thomas Aquinas* (1931). Hagenauer was following still earlier scholars who distinguished the "subjective" factors of need and scarcity from the "objective" factors of labor and expenses, and believed that Thomas had emphasized the latter. E.g., Kaulla, *Die geschichtliche Entwicklung der modernen Werttheorien* (1906), 53; Schreiber, *Die volkswirtschaftlichen Anschauungen der Scholastik seit Thomas von Aquin* (1913), 120.

14. Lessius, *De iustitia et iure* lib. 2, cap. 21, dub. 4; Soto, *De iustitia et iure* lib. 6, q. 3, a. 1.

15. Soto, *De iustitia et iure* lib. 6, q. 2, a. 3.

16. Heinrich Coccejus, *Ius civile controversum* (1766), to Dig. 18.5, q. 7, 16; Wolfgang Lauterbach, *Collegii theoretico-practici* (1744), to Dig. 18.5 §§ 23–24; Burkhard Struvius, *Syntagma academicus et forensis* (1692), Exerc. XXIII ad lib. 18, tit. 1, §§ 85, 92; Johannes Voet, *Commentarius ad pandectas* (1698), to Dig. 18.1 §§ 7, 13; Iohannes Westenberg, *Principia iuris secundum ordinem digestorum seu pandectarum* (4th edn., 1764), to Dig. 18.1 §§ 12–13.

17. Robert Pothier, *Traité des obligations*, in *Oeuvres de Pothier* 2 (Bugnet, ed., 2nd edn., 1861), §§ 38–39; Claude de Ferrière, *Dictionnaire de droit et de pratique* (nouv. edn., 1769), II, v. "lésion d'outre moitié de juste prix," 135, 137; Honoré Lacombe de Prezel, *Dictionnaire portatif de jurisprudence et de pratique* (1763), II, v. "lésion," 430.

natural law principle, it is not clear how much of the natural law theory most French, Dutch, and German jurists understood. Usually, they did not explain the remedy except to say that a price should be just. Occasionally, they said that exchange requires equality.<sup>18</sup> In the late eighteenth and early nineteenth century, some jurists were becoming sceptical about whether one could ever say that a price was unjust. It seemed to them to involve mystical notions about economic value. The eighteenth-century jurist Christian Thomasius argued that to speak of a just price was to imagine that value is an intrinsic property of things, like their color. But value depends “on the mere judgment of men.”<sup>19</sup> This argument impressed Suarez<sup>20</sup> who drafted a code for Prussian law, the *Allgemeines Landrecht*, which was enacted in 1794. This Code eliminated relief for an unjust price “in and of itself”<sup>21</sup> although it said that error would be “presumed” when a buyer paid twice the normal price.<sup>22</sup>

In France, when the Civil Code was drafted, this argument persuaded Berlier that the traditional remedy should be abolished.<sup>23</sup> But he was in the minority. Article 1674 gave a remedy only to the seller of land, as had the original Roman text and traditional French law. The article required, however, that the seller receive less than five-twelfths its value rather than less than half.

The reason relief was limited to the seller of land was not scepticism about the principle of equality in exchange. Portalis, Cambacérès, and Tronchet all said that an exchange or commutative contract requires equality.<sup>24</sup> Napoleon acknowledged that “[t]here is not a contract of sale when one does not receive the equivalent of what one gives.”<sup>25</sup> The limitation on relief was explained pragmatically: land was more important than other things sold;<sup>26</sup> its price is more stable;<sup>27</sup> the buyer is less likely than the seller to be the victim of necessity<sup>28</sup> or mistake<sup>29</sup> and more likely to seek to avoid the transaction because his plans had changed.<sup>30</sup>

With the rise of the will theories of contract, however, arguments like those of Thomasius and Berlier seemed unanswerable. The terms of a contract could have no other source than the will of the parties. Most nineteenth-century French treatise writers doubted that a remedy should

18. E.g., Pothier, *Traité des obligations*, § 33; Lauterbach, *Collegii* to Dig. 18.1, § 37; Struvius, *Synallagma* Exerc. XXIII to Dig. 18, tit. 1 § 19 (citing Aristotle).

19. Christian Thomasius, “De aequitate cerebrina legis II. Cod. de rescind. vendit. et eius usu practico” cap. II, § 14, printed as *Dissertatio LXXIII* in Thomasius, *Dissertationum Academicarum varii inprimis iuridici argumenti* (1777), III, 43. See Klaus Luig, “Der gerechte Preis in der Rechtstheorie und Rechtspraxis von Christian Thomasius (1655–1728),” in *Diritto e potere nella storia europea: Scritti in onore di Bruno Paradisi* 2 (1982), 775.

20. Koch, ed., *Allgemeines Landrecht für die Preussischen Staaten* 1 (7th edn., 1978), § 58 n. 8.

21. Hottenhauer, ed., *Allgemeines Landrecht für die Preussischen Staaten von 1794* 1 (1970), § 58.

22. *Ibid.* § 59.

23. P.A. Fenet, ed., *Recueil complet des travaux préparatoires du Code Civil* 14 (1836), 36.

24. *Ibid.* 43, 46–7, 130–1 (Portalis); *ibid.* 43 (Cambacérès); *ibid.* 63 (Tronchet).

25. *Ibid.* 58.

26. *Ibid.* 57–8 (Bonaparte).

27. *Ibid.* 49, 140–1 (Portalis).

28. *Ibid.* 145 (Portalis), 75 (Tronchet), 177 (Faure). Portalis had originally wished to give the buyer a remedy but was outvoted. *Ibid.* 76.

29. *Ibid.* 75 (Ségur).

30. *Ibid.* 77 (Bonaparte).

be given at all. Demolombe argued that value was “subjective,” “variable and relative.”<sup>31</sup> Laurent observed that things worth one amount “from a commercial point of view” might be worth quite a different amount to the parties because of their “needs, tastes and passions.”<sup>32</sup> Jurists more sympathetic to the remedy defended it without invoking a principle of equality in exchange. Duranton, Colmet de Santerre, and Marcadé claimed that disparity in the price constituted evidence of fraud, mistake, duress, or a sort of moral constraint.<sup>33</sup> Glasson thought that, although relief violated the “principle of freedom of contract,” it was justified for reasons of “humanity.”<sup>34</sup>

Nineteenth-century German jurists were also sceptical. In Germany, relief for an unjust price was abolished by statute in Bavaria in 1861,<sup>35</sup> in Saxony in 1863,<sup>36</sup> and in commercial matters by the Allgemeines Handelsgesetzbuch of 1861.<sup>37</sup> Defending this step, Endemann argued, like Thomasius, that value was relative.<sup>38</sup>

The Roman text remained in force where it had not been replaced by statute. But German jurists regarded the remedy as an exception to the normal rules of contract law. The basic principle – “rooted in the law of sale” according to Windscheid,<sup>39</sup> “lying in the nature of things” according to Vangerow<sup>40</sup> – was to be found in the other Roman text that said each party could outwit the other.<sup>41</sup> Relief for unfairness was an exception to the principle that contracts are binding.<sup>42</sup> German jurists usually explained that relief was an exception based upon equity<sup>43</sup> and argued how large the exception was. Some wished to limit relief to sellers of land on the ground that relief was given by way of exception,<sup>44</sup> others wished to extend relief to buyers of land and parties to other kinds of contracts because to do so would

31. Charles Demolombe, *Cours de Code Napoléon* 24 (1854–82), § 194.

32. François Laurent, *Principes de droit civil français* 15 (3rd edn., 1867–78), § 485.

33. Alexandre Duranton, *Cours de droit civil français suivant le Code civil* 10 (3rd edn., 1834–37), § 200–01; A.M. Demante and E. Colmet de Santerre, *Cours analytique du Code civil* 5 (2nd edn., 1883), § 28 bis. (by Colmet de Santerre); Victor Marcadé, *Explication théorique et pratique du Code Napoléon* (5th edn., 1859), 357–8.

34. Glasson, *Eléments du droit français considéré dans ses rapports avec le droit naturel et l'économie politique* (2nd edn. 1884), 550, 553.

35. Landtagsabschiedes of Nov. 10, 1861 § 282.4 [1861–62] *Gesetzblatt*, quoted in Danzer, *Das Bayerische Landrecht (Codex Maximilianeus Bavaricus Civilis) vom Jahre 1756 in seiner heutigen Geltung* (1894), 229–30. Until then, the remedy for an unjust price had been preserved in the *Codex Maximilianeus Bavaricus Civilis* IV iii §§ 19–22 (enacted in 1756).

36. *Bürgerliches Gesetzbuch für des Königreich Sachsen* § 864.

37. Allgemeines deutsches Handelsgesetzbuch, art. 286.

38. Endemann, *Handbuch des deutschen Handels See und Wechselrechts* 2 (1882), § 261.III.

39. Bernhard Windscheid, *Lehrbuch des Pandektenrechts* 2 (7th edn., 1891), § 396 n. 2.

40. Karl Vangerow, *Leitfaden für Pandekten-Vorlesungen* 3 (Marburg, 1847), § 611 n. 1.

41. Dig. 19.2.22.3.

42. Rudolph Holzschuher, *Theorie und Casuistik des gemeinen Civilrechts* 3 (1864), 729–30.

43. Vangerow, *Leitfaden*, 3: § 611 n. 1; Wächter, *Pandekten*, 2 (Leipzig, 1881) § 207; Windscheid, *Lehrbuch*, 2: § 396 n. 2.

44. Holzschuher, *Theorie*, 3: 729–30; Vangerow, *Leitfaden*, 3, § 611; Wächter, *Pandekten*, 2, § 207. Some said the exception should be limited to sellers because it was meant to protect those in need, and sellers who accepted a low price would be more likely to be needy than buyers who paid a high one. Georg Friedrich Puchta, *Pandekten* (2nd edn., 1844), § 364; F. von Keller, *Pandekten* (1861), 333.

be equally equitable.<sup>45</sup> Everyone agreed, however, that they were dealing with an exceptional kind of relief that departed from the normal principles of contract law. The initial drafts of the German Civil Code abolished the traditional remedy. In the final draft, however, § 138(2) was added which, as we will see, voids a transaction in which one person exploits certain enumerated weakness of another to obtain a “striking disproportion” in the value of the performances exchanged.<sup>46</sup> The rule seemed to be a fair one even though no one had a theory of why a “striking disproportion” should matter.

### Common Law

Traditionally, a promise was enforceable in *assumpsit* whether the consideration given in return was adequate or not. Courts of equity, however, could give relief if a bargain was so harsh as to be “unconscionable.” Nevertheless, the common law courts had not rejected the principle of equality in exchange. Nor had the courts of equity accepted it.

As A.W.B. Simpson observed,<sup>47</sup> the judges who fashioned the rule against examining the adequacy of consideration were not facing the problem of what to do about hard bargains. They were deciding what promises to enforce. As we have seen, they found consideration for certain gratuitous arrangements such as gifts to prospective sons-in-law and gratuitous loans and bailments.<sup>48</sup> To demand that consideration be equal would have prevented the judges from achieving the goal of enforcing certain promises for which the consideration was not a recompense. For example, in *Sturlyn v. Albany*,<sup>49</sup> the court said that “when a thing is done, be it never so small, this is a sufficient consideration to ground an action.” These words were often quoted in later cases. As Simpson has pointed out, however, *Sturlyn* had nothing to do with enforcing a hard bargain.<sup>50</sup> The plaintiff had leased to a third party who then granted his estate to the defendant. The plaintiff demanded rent from the defendant who promised to pay if the plaintiff would show him a deed proving the rent was due. The showing of the deed was said to be consideration.

Conversely, the courts of equity gave relief from hard bargains without espousing the principle that each party to an exchange should receive something equal in value to what he gave. It is hard to find even a passing reference to such a principle in the seventeenth- and eighteenth-century court opinions or the arguments of counsel. Instead, there is general talk

45. E.g., J. Seuffert, *Praktisches Pandektenrecht* 2 (3rd edn., 1852), § 272.

46. The weaknesses were originally “necessity, indiscretion or inexperience.” In 1976, to make them harmonize with Criminal Code (*Strafgesetzbuch*) § 302(a), the phrase was changed to “distressed situation, inexperience, lack of judgmental ability, or grave weakness of will.” Law of

July 29, 1976, BGBl 1976 I 2034, 2038 (art. 3).

47. A.W.B. Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (1975), 445–9.

48. *Ibid.* 416–52.

49. *Sturlyn v. Albany*, Cro. Eliz. 67, 78 Eng. Rep. 327 (Q.B. 1587).

50. Simpson, *History*, 447.



about whether a bargain is “unreasonable,”<sup>51</sup> “unjust,”<sup>52</sup> “unequitable and unconscientious,”<sup>53</sup> “hard and unequal,”<sup>54</sup> or entered into for “inadequate” or “grossly inadequate” consideration,<sup>55</sup> or through “imposition.”<sup>56</sup> Moreover, before 1750, nearly all the cases in which courts of equity gave relief concerned either necessitous heirs who sold their inheritance at a low price or else the repercussions of the South Sea Bubble.<sup>57</sup> In helping heirs, they seem to have been concerned, not about equality in exchange, but about the squandering of family estates.<sup>58</sup> In assisting victims of the South Sea Bubble, they were not helping those who paid more than the market price but those who bought when the market price of land was high due to the high price of South Sea company stock.<sup>59</sup> Thus giving relief may actually have contradicted the natural lawyers’ position that the just price is the market price.

In the nineteenth century, however, Anglo-American jurists, like their continental brethren, claimed that, in principle, there could be no relief for an unfair price. They said that the reason the common law courts would not examine the adequacy of consideration was because, in principle, the fairness of an exchange did not matter. Their arguments were like those made on the continent. According to Joseph and W.W. Story, Chitty, Metcalf, and Addison to give relief would raise imponderable questions about value.<sup>60</sup> Pollock, as noted earlier, addressed the subject by quoting part of Hobbes’ remark that “the value of all things contracted for is

51. *Earl of Arglasse v. Muschamp*, 1 Vern. 237, 238–9; 23 Eng. Rep. 438, 439 (1684); *Earl of Chesterfield v. Jannsen*, 2 Ves. Sen. 125, 130, 28 Eng. Rep. 82, 85 (1750–51) (argument for plaintiff).

52. *Earl of Chesterfield v. Jannsen*, 2 Ves. Sen. 125, 130, 28 Eng. Rep. 82, 85 (1750–51) (argument for plaintiff).

53. *Chesterfield v. Jannsen*, 2 Ves. Sen. 125, 155, 28 Eng. Rep. 82, 100 (1750–51).

54. *Kien v. Stukeley*, 1 Bro. 191, 192, 1 Eng. Rep. 506, 507 (H.L. 1722) (argument for defendant).

55. *Gwynne v. Heaton*, 1 Bro. C.C. 1, 6, 28 Eng. Rep. 949, 951 (1778).

56. *Earl of Chesterfield v. Jannsen*, 2 Ves. Sen. 125, 145, 152, 156, 28 Eng. Rep. 82, 94, 98, 100 (1750–51); *Nichols v. Gould*, 2 Ves. Sen. 422, 423, 28 Eng. Rep. 270, 270 (1752).

57. See A.W.B. Simpson, “The Horwitz Thesis and the History of Contracts,” *U. Chi. L. Rev.* 46 (1979), 533–601, 562–6. A few cases involved neither necessitous heirs nor the South Sea Bubble. Even in these cases, however, the courts did not endorse a principle of equality in exchange. *Osmond v. Fitzroy & Duke of Cleveland*, 3 P. Wms. 129, 24 Eng. Rep. 997 (1731) (bond given servant by lord during his minority set aside for breach of trust); *Willis v. Jernegan*, 2 Atk.

251, 26 Eng. Rep. 555 (1741) (relief denied when plaintiff bought lottery tickets from defendant); *How v. Waldon & Edwards*, 2 Ves. Sen. 516, 28 Eng. Rep. 330 (1754) (relief given to sailor who sold in advance and for a small sum the right to the prize money where “inadequateness of value” was combined with a risk of obtaining the money that had been so “greatly misrepresented” as to constitute “gross fraud”).

58. As the court mentions in *Johnson, Ex’r of Hill v. Nott*, 1 Vern. 271, 272, 23 Eng. Rep. 464, 465 (1684); *Twistleton v. Griffith*, 1 P. Wms. 310, 311, 24 Eng. Rep. 403, 404 (1716); *Earl of Chesterfield v. Jannsen*, 2 Ves. Sen. 125, 144–45, 28 Eng. Rep. 82, 93–4 (1750–51).

59. As mentioned in *Kien v. Stukeley*, 1 Bro. 191, 192, 11 Eng. Rep. 506, 507 (H.L. 1722); *Savile v. Savile*, 1 P. Wms. 745, 746–7, 24 Eng. Rep. 596 (1721).

60. Joseph Story, *Commentaries on Equity, Jurisprudence as Administered in England and America* 1 (14th edn., 1918), 437–8; William Wetmore Story, *A Treatise on the Law of Contracts Not Under Seal* (3rd edn., 1851), 437–8; Theodor Metcalf, *Principles of the Law of Contracts as Applied by the Courts of New York* (1878), 163.

measured by the appetite of the contractors . . . .”<sup>61</sup> Moreover, to give relief would be to interfere with the decision of the parties themselves.<sup>62</sup>

The jurists then explained away the doctrine of unconscionability by giving it a new rationale. As Simpson notes, a disparity in price came to be considered as “evidence of fraud, not as an independent substantive ground, and not as constituting hardship.”<sup>63</sup> While the fraud theory never swept the field,<sup>64</sup> it found its way into many treatises beginning with the early one by Powell in 1790.<sup>65</sup> Indeed, Joseph Story, William Wetmore Story, and Metcalf<sup>66</sup> argued that the fraud theory must be correct since questions of value are imponderable. Courts of equity nevertheless continued to give relief, perhaps as generously as they would have if the theory had not changed.<sup>67</sup>

The jurists also claimed that the reason the common law courts would not examine the adequacy of consideration was because, in principle, the fairness of an exchange did not matter. Their arguments were like those made on the continent. According to Joseph and W.W. Story, Chitty, Metcalf, and Addison to give relief would raise imponderable questions about value.<sup>68</sup> Pollock, as noted earlier, addressed the subject by quoting part of Hobbes’ remark that “the value of all things contracted for is measured by the appetite of the contractors . . . .”<sup>69</sup> Moreover, to give relief would be to interfere with the decision of the parties themselves.<sup>70</sup>

As we will see, however, in the last half of the twentieth century, the doctrine of unconscionability has seen a renaissance. Section 2–302 of the Uniform Commercial Code allows a judge to remedy “unconscionable” contracts without any distinction between law and equity. Section 208 of

61. Sir Frederick Pollock, *Principles of Contract* (4th edn., 1888), 172.

62. J. Story, *Commentaries* 1: 337; W.W. Story, *Law of Contracts*, 435; Joseph Chitty, *A Practical Treatise on the Law of Contracts Not Under Seal* (1826), 7; Metcalf, *Law of Contracts*, 163; Charles Addison, *A Treatise on the Law of Contracts* (11th edn., 1911), 12; S. Martin Leake, *The Elements of the Law of Contracts* (London, 1867), 311–12; Bishop, *Law of Contracts*, 18; John Newland, *A Treatise on Contracts within the Jurisdiction of Courts of Equity* (1821), 357; Louis Hammon, *The General Principles of the Law of Contract* (1912), 692.

63. Simpson, “Horwitz Thesis”, 569.

64. See, e.g., Theophilus Parsons, *The Law of Contracts* 1 (4th edn., 1860), \*362–63; John Norton Pomeroy, *A Treatise on the Specific Performance of Contracts as it is Enforced by Courts of Equitable Jurisdiction in the United States of America* (2nd edn., 1897), 274–5.

65. John J. Powell, *Essay upon the Law of Contracts and Agreements* 2 (1790), 157–8;

Bishop, *Law of Contracts*, 18–19; Hammon, *General Principles of the Law of Contract*, 694–5; Metcalf, *Law of Contract*, 163; Newland, *Treatise on Contracts*, 358–9; J. Story, *Commentaries* 1: 341; W. W. Story, *Law of Contracts*, 437–8.

66. J. Story, *Commentaries* 1: 399; W.W. Story, *Law of Contracts*, 437–8; Metcalf, *Law of Contracts*, 163.

67. James Gordley, “Equality in Exchange,” *Calif. L. Rev.* 69 (1981), 1587 at 1650–5.

68. J. Story, *Commentaries* 1: 339; W.W. Story, *Law of Contracts*, 435; Chitty, *Law of Contracts*, 12.

69. Sir Frederick Pollock, *Principles of Contract* (4th edn., London, 1888), 172.

70. J. Story, *Commentaries* 1: 337; W. W. Story, *Law of Contracts*, 435; Chitty, *Law of Contracts*, 7; Metcalf, *Law of Contracts*, 163; Addison, *Law of Contracts*, 12; Leake, *Law of Contracts*, 311–12; Bishop, *Law of Contracts*, 18; Newland, *Treatise on Contracts*, 357; Hammon, *Law of Contract*, 692.



the Second Restatement of Contracts contains a similar provision applicable to contracts in general.

## **b. Modern Law**

### **English Law**

#### **Cresswell v. Potter, [1978] 1 W.L.R. 255 (Ch.)**

While plaintiff and defendant were married, plaintiff had a half interest in the house in which they lived. She had contributed, indirectly at least £65 and perhaps £200 toward its purchase price. It was bought for £1,500 of which £1,200 was raised by a mortgage. The plaintiff left the defendant after admitting to adultery. The defendant obtained an uncontested divorce, evidence of plaintiff's adultery having been obtained by Thomas Olyott, an "inquiry agent." The plaintiff signed a "release" of her rights in the house presented to her by Olyott. She claimed that she did not read it but thought it would enable the defendant to sell the house without affecting her rights in it. Later, he sold it for £3,350. Plaintiff sued to set aside the release. Held, for plaintiff.

Megarry J. "I think I can go straight to the well-known case of *Fry v. Lane* (1888) 40 Ch.D. 312 . . . The judge[in that case] laid down three requirements. What has to be considered is, first, whether the plaintiff is poor and ignorant; second, whether the sale was at a considerable under-value; and third, whether the vendor had independent advice. I am not, of course, suggesting that these are the only circumstances which will suffice; thus there may be circumstances of oppression or abuse of confidence which will invoke the aid of equity. But in the present case only these three requirements are in point . . .

I think that the plaintiff may fairly be described as falling within whatever is the modern equivalent of 'poor and ignorant.' Eighty years ago, when *Fry v. Lane* was decided, social conditions were very different from those which exist today. I do not, however, think that the principle has changed, even though the euphemisms of the 20th century may require the word 'poor' to be replaced by 'a member of the lower income group' or the like, and the word 'ignorant' by 'less highly educated.' The plaintiff has been a van driver for a tobacconist, and is a Post Office telephonist. The evidence of her means is slender. The defendant told me that the plaintiff probably had a little saved, but not much; and there was evidence that her earnings were about the same as the defendant's, and that these were those of a carpenter. The plaintiff also has a legal aid certificate.

In those circumstances I think the plaintiff may properly be described as 'poor' in the sense used in *Fry v. Lane*, where it was applied to a laundryman who, in 1888, was earning £1 a week. In this context, as in others, I do not think that 'poverty' is confined to destitution. Further, although no doubt it requires considerable alertness and skill to be a good telephonist, I think that a telephonist can properly be described as 'ignorant' in the context of property transactions in general and the

execution of conveyancing documents in particular. I have seen and heard the plaintiff giving evidence, and I have reached the conclusion that she satisfies the requirements of the first head.

The second question is whether the sale was at a ‘considerable under-value.’ Slate Hall cost £1,500, £1,200 of the price being provided by the mortgage . . . If Slate Hall was worth no more than it cost, she was giving up her half share in an equity worth £30 . . . In fact, as is now known, within a little over two years the property fetched £3,350, so that at the time in question the plaintiff’s share of the equity may have been worth appreciably more than £150 . . .

As for independent advice, from first to last there is no suggestion that the plaintiff had any.”

**Note.** Notice that relief in this case was given in Chancery, the court which developed the doctrine of “unconscionability” in England and was traditionally the only one to concern itself with the fairness of a bargain.

### Law in the United States

#### Uniform Commercial Code

##### § 2-302 UNCONSCIONABLE CONTRACT OR CLAUSE

- (1). If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause to avoid any unconscionable result.
- (2). When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

#### Restatement (Second) of Contracts

##### § 208. UNCONSCIONABLE CONTRACT OR TERM

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

#### Token v. Westerman, 274 A.2d 78 (N.J. Super. 1970)

“On November 7, 1966 plaintiff’s assignor, People’s Foods of New Jersey, sold a refrigerator-freezer to defendant under a retail installment contract. The cash price for the unit was \$899.98. With sales tax, group life

insurance and time price differential the total amount was \$1,229.76, to be paid in 36 monthly installments of \$34.16 each.

Defendants made payments over a period of time, but resist payment of the balance in the sum of \$573.89, claiming that the unit was so greatly over-priced as to make the contract unenforceable under N.J.S. 12A:2-302

...

At the trial defendant presented an appliance dealer who had inspected the refrigerator-freezer in question. He stated that the same had a capacity of approximately 18 cubic feet, was not frost-free, and, with no special features, was known in the trade as a stripped unit. He estimated the reasonable retail price at the time of sale as between \$350 and \$400. He testified that the most expensive refrigerator-freezer of comparable size, with such additional features as butter temperature control and frost-free operation, at that time sold for \$500 ...

It is apparent that the court should not allow the statutory provision in question [U.C.C. 2-302] to be used as a manipulative tool to allow a purchaser to avoid the consequences of a bargain which he later finds to be unfavorable. Suffice it to say that in the instant case the court finds as shocking, and therefore unconscionable, the sale of goods for approximately 2½ times their reasonable retail value. This is particularly so where, as here, the sale was made by a door-to-door salesman for a dealer who therefore would have less overhead expense than a dealer maintaining a store or showroom. In addition, it appeared that defendants during the course of the payments they made to plaintiff were obliged to seek welfare assistance."

### **Carboni v. Arrospide, 2 Cal. App. 4th 76 (1991)**

"In this case we consider whether a secured note providing for interest at a rate of 200 percent per annum is unconscionable. In the circumstances presented here, we conclude that it is ...

The evidence at trial established that on July 27, 1988, George Arrospide, Jr., signed a \$4,000 note and deed of trust on behalf of his father, Jorge Arrospide, Sr., as his attorney in fact. The note was made in favor of Michael Carboni, a licensed real estate broker. It carried an interest rate of 200 percent per annum, was due in three months ... The parties originally intended the note would be paid off in a single lump sum payment of \$6,000 after three months. However, over the next four months, Carboni continued to make cash advances to Jorge Sr. which were secured by the original note and deed of trust. By November 25, 1988, the principal amount of the note had ballooned to \$99,346, all of which was carried at an interest rate of 200 percent per annum. At the time of trial in March of 1990, the principal and accumulated interest amounted to nearly \$390,000.

The testimony was sharply divided concerning the purpose for the loan. Carboni testified that the money was advanced directly to George Jr. to be used to refurbish residential property which he intended to resell at a profit. The Arrospides, on the other hand, claimed the money was used

for Jorge Sr.'s 'personal obligations' – primarily to pay medical expenses for his ailing parents who lived in Peru. George Jr. testified that his father was under 'emotional duress' because of these personal obligations, and that he obtained the loan at his father's specific instruction . . .

The leading California case on unconscionability generally follows Professor Williston's analysis of the issue. In *A & M Produce Co. v. FMC Corp.* [(1982) 135 Cal.App.3d 473, 476 (1982)] the court recognized that unconscionability has both a 'procedural' and a 'substantive' aspect. The procedural aspect is manifested by (1) 'oppression,' which refers to an inequality of bargaining power resulting in no meaningful choice for the weaker party, or (2) 'surprise,' which occurs when the supposedly agreed-upon terms are hidden in a prolix document.

'Substantive' unconscionability, on the other hand, refers to an overly harsh allocation of risks or costs which is not justified by the circumstances under which the contract was made. [citation omitted] Presumably, both procedural and substantive unconscionability must be present before a contract or clause will be held unenforceable. However, there is a sliding scale relationship between the two concepts: the greater the degree of substantive unconscionability, the less the degree of procedural unconscionability that is required to annul the contract or clause. [citations omitted] . . .

We have little trouble concluding that an interest rate of 200 percent on a secured \$99,000 loan is substantively unconscionable; i.e., that it imposes a cost on the borrower which is overly harsh and was not justified by the circumstances in which the contract was made . . .

[A]ccording to Carboni's own testimony, the interest rate (200 percent) was approximately 10 times the rate then prevailing in the credit market for similar loans . . . Carboni contends the high interest rate was justified because no other charges were made for the loan (such as points and documentation fees) and, if it had been paid off as scheduled, the loan would have actually been cheaper than the alternatives available to the Arrospides. Carboni's own testimony again undermines his argument. Carboni claimed the Arrospides could have obtained a \$4,000 loan secured by a third deed of trust for 10 points (\$400) at 18 to 21 percent interest (approximately \$200 for 3 months) plus costs for document preparation, title insurance and 'so forth.' Thus the entire cost for a three-month 'conventional' loan would have been \$600 plus unspecified costs for document fees and title insurance. As it was, at 200 percent interest, Jorge Sr. would have paid \$2,000 to borrow \$4,000 for three months. In these circumstances, we doubt whether the loan obtained was cheaper than more conventional financing.

In any event, Carboni's argument ignores the fact that the principal amount of the note ballooned over the next four months to more than \$99,000, and that the due date was extended (at least implicitly) beyond three months. Carboni voluntarily transformed a \$4,000 note into a \$99,000 line of credit. His argument simply cannot justify a 200 percent

rate on the amount ultimately borrowed (\$99,000) for an unspecified term ...

[T]he procedural aspect of unconscionability refers to an absence of meaningful choice on the part of one of the parties ... [W]e believe there was an inequality of bargaining power which effectively robbed Jorge Sr. of any meaningful choice.

Viewing the evidence in the light most favorable to the judgment, we must presume Jorge Sr. was acting under emotional distress when he borrowed the funds to pay his parents' medical expenses. Most important, it appears Jorge Sr. had attempted unsuccessfully to secure a loan from other sources. The 'Agreement' signed by the parties in connection with the loan states that 'Owner acknowledges and agrees that Lender's charges for the loan are costly, but Owner has tried unsuccessfully to obtain a loan from other sources and now feels that making this loan is the best way for Owner to make the payments on his bills and obligations.' Thus, it appears that Jorge Sr. had unequal bargaining power because he was unable to obtain a loan from other sources. Consequently, Carboni was able to offer him credit on a 'take it or leave it' basis. This effectively deprived Jorge Sr. and his son of any meaningful choice, since they had no alternative for obtaining credit."

**Note.** The court seems to be saying that the contract is "substantively" unconscionable because the borrower could have obtained credit at a lower rate and "procedurally" unconscionable because he could not. Consider whether this decision is correct if, given his credit status, the borrower could not have obtained credit at a lower rate.

## German Law

### German Civil Code

#### § 138 TRANSACTION CONTRARY TO GOOD MORALS

- (1). A legal transaction that violates good morals (*gute Sitten*) is void.
- (2). A legal transaction is also void when a person takes advantage of the distressed situation, inexperience, lack of judgmental ability, or grave weakness of will of another to obtain the grant or promise of financial advantages for himself or a third party that are obviously disproportionate to the performance given in return.

**Note on the Term "usury".** In the Middle Ages, "usury" meant taking any interest on a loan. In modern English, it means taking excessive interest. In modern German, "usury" (*Wucher*) means taking excessive advantage. So § 138(2) is said to be a remedy for "usury" even though that sounds a bit odd in English.

**Note on Door-to-door Sales.** Section 312 of the German Civil Code now provides that if a consumer enters into a contract of exchange with someone who has come to his home or his place of work he has the right to cancel it. According to § 355, he must do so within two weeks. He can cancel for any reason or no reason, not simply if the price is unfair.

**Reichsgericht, October 14, 1921, RGZ 103, 35**

"The defendant leased certain property from the plaintiff in March 1918. In April 1918 the defendant sought to withdraw from the contract and to have it set aside for error and for fraud, and also argued that it was void under § 138 of the Civil Code. The plaintiff brought an action to establish that the lease was valid. Judgments below and on appeal were for the plaintiff. The defendant's appeal [*Revision*] was successful . . .

The court of appeal . . . was in error in holding that § 138 of the Civil Code was not applicable. The court only concerned itself with the objection of usury under the second paragraph of § 138. In view of the factual situation, as it was established, and the claims of the defendant, which are backed by evidence, even this result is legally doubtful. The lease, which generally puts the burdens predominantly on the lessee (see §§ 1, 4, 6) contains especially oppressive provisions in §§ 5, 7, and 8. Under § 5 the lessor has the right to restrict the lessee's use to one-half of the leased property. In this event the yearly payment is to be reduced from 650 to 350 Reichsmarks, but no refund is to be made on the lump-sum payment of 8,000 Reichsmarks made at the commencement of the lease regardless of the year of the lease in which this occurs. The court of appeal recognized that this provision was particularly oppressive for the defendant but considered that it should refuse, even for the situation thus envisaged, to recognize a gross disproportion in the rent and the other obligations assumed by the defendant. The court of appeal relied here upon its own evaluation, but did not even say what it would consider to be the normal rent. The defendant asserted, relying upon experts, that the normal rent would be 500 Reichsmarks, thus without regard to § 5, only one-third of the yearly rent paid under the lease that the court of appeal set at 1594 Reichsmarks. Although the court of appeal is free to call its own experts or to decide on the basis of its own knowledge, it must make a finding on this point. Under § 7 the lessor is given the right to require the lessee to give up the premises at once in the event that the rent is not paid on time or other duties under the lease are not properly performed by the lessee. The lessee, however, remains liable for the future rent and the lump-sum payment of 8,000 Reichsmarks is lost, also without any distinction as to when this took place. Under § 8, the lessor's heirs, in the event of her death, have the right to terminate the lease. If this termination occurs within the first three years of the lease, half of the 81,000 Reichsmark payment will be returned. The disproportion that emerges from all of these provisions taken together cannot be justified by the interests of the lessee upon which the court of appeal relied. There is no evidence that the lessee was in special difficulties at the time the lease was concluded, but the fact that the lessee entered so easily upon such an unusually burdensome contract indicates indiscretion, that is to say, a failure to understand the consequences of acts due to indifference or to a lack of sufficient reflection. The defendant has offered proof that she was, in general, inexperienced in business matters and that the plaintiff knew this. Therefore, it is not necessary to have further evidence taken as to the factual situation nor to consider the case again under § 138(2) of the Civil Code as the lease is



void under the facts as found under § 138(1), which the court of appeal did not consider. The courts, to be sure, have usually drawn the conclusion as to § 138(2) that standing alone, a disproportion between performance and counter-performance, even if very large, cannot justify the applying the general principle of § 138(1). Nevertheless, other circumstances, either alone or in combination with such a disproportion, may cause a transaction to appear as immoral and, therefore, void under § 138(1). That is so with § 7 of the contract which provides that every defect in performance not only made the lessee lose the right to continued use of the property, while the rent still had to be paid, but also results in the loss of the entire 8,000 Reichsmark payment. Particularly objectionable is the intention, which finds expression in various provisions of the contract, including § 7, to retain the 8000 Reichsmark down payment, if at all possible, without giving any performance in return . . . The contract is therefore void under § 138(1). The complaint is rejected and the plaintiff ordered to repay the 8,000 Reichsmarks with interest.”

### **Reichsgericht, March 31, 1936, RGZ 150, 1**

“The Fifth Civil Senate of the Reichsgericht . . . brought the following question before the Great Senate for Civil Matters of the Reichsgericht: According to the judicial decisions interpreting § 138 of the Civil Code . . . , is it to be maintained that:

A transaction in which performance and counterperformance are strikingly disproportionate is invalid when either all of the elements of usury (§ 138, par. 2) are present, or some additional circumstance is added to the disproportion which, taken together with the disproportion, makes the contract contrary to good mores given the entire form of the contract as shown by the combination of its content, motive, and purpose, and hence as shown by the combination of objective and subjective criteria (§ 138, par. 1) or, in the alternative, can a transaction be held invalid under § 138, par. 1 of the Civil Code when the mere presence of a striking disproportion is proven without the addition of an additional circumstance and without consideration of the character of the party interested in the transaction, and thus when the transaction is considered in a purely objective manner . . . ?

The Great Senate for Civil Matters of the Reichsgericht answered the question in the following manner:

A juristic act (*Rechtsgeschäft*) in which performance and counterperformance are strikingly disproportionate but in which the remaining elements of usury (§ 138, par. 2) are not present is invalid under § 138, par. 1 when, in addition to the disproportion, the party claiming the disproportionate advantage exhibits such a character that the juristic act, given its content, motive, and purpose, offends healthy national and popular feeling (*gesunde Volksempfindungen*). Under some circumstances, such a character may be inferred from the disproportion. When one party, through malice or gross negligence, ignores the fact



that the other has consented to hard terms to escape a difficult situation, this consideration can, in conjunction with the disproportion, make the juristic act invalid ...

[T]he judicial decisions of the *Reichsgericht* indicate that when all the elements of usury are not present, the transaction is to be declared invalid if, in addition to the magnitude of what is promised, some other circumstance is also present which, taken in conjunction with the disproportion, makes the juristic act appear contrary to good morals, given the entire form of the juristic act as shown by the combination of its content, motive, and purpose. As a rule, the party who will be harmed if the transaction is declared to be invalid must have been aware of the factual circumstances which make his action appear offensive to proper conduct, although he need not have been aware that his action offended good morals. The *Reichsgericht* has abandoned the narrower view ... that transactions in which a disproportion is present between performance and counterperformance ... is sufficient of itself to prove the invalidity of the transaction on the basis of § 138, par. 1, without the conjunction of any additional circumstances, and in particular without consideration of the character of the party interested in the transaction, and thus by a purely objective evaluation ...

The Great Senate for Civil Matters ... considers a legal transaction in which performance is strikingly disproportionate to counterperformance, but in which the remaining characteristics of usury are absent, to be invalid under § 138, par. 1 of the Civil Code if, in addition to the disproportion, the party claiming the disproportionate advantage exhibits such a character that the juristic act, given its content, motive, and purpose, offends the healthy national and popular feeling (*gesunde Volksempfindungen*).

The following considerations lead it to this conclusion.

The concept of an 'offense to good morals,' as contained in §§ 138 and 826 of the Civil Code must, by its nature, receive its content from the feelings of the people dominant since the revolution: from the National Socialist world view (*Weltanschauung*). Section 138, with its content completed in this way, is also applicable to juristic acts of the earlier period in which all matters have not yet been finally settled. If a contract is offensive to good morals, according to the viewpoint that is now determinative, then no legal protection can be granted to it by a German court.

The whole of the content of § 138 shows that a disproportion alone does not lead to the invalidity of a legal transaction. For, if the presence of a disproportion were a sufficient factual circumstance for invalidity, it would be pointless for paragraph 2 to add particular requirements for invalidity which look to the external and internal factual situation of the parties. The mention of additional elements necessary for invalidity demonstrates that the factual circumstance of a disproportion, taken alone, cannot lead to invalidity. For the provisions of paragraph 1 to be applied, more ought to be present than simply the disproportion which is one of the elements of usury of paragraph 2. For paragraph 1 to apply, some other circumstance must be

added in the place of the elements of exploitation which are not present, a circumstance which, together with the disproportion, gives the transaction the mark of an offense to good morals.

Such an interpretation of the statute is internally correct because it corresponds to the general concept of an 'offense to good morals.' A proper view of the morality of an action requires that the total form of the action be examined, and not that single factual circumstances be treated in isolation and separation from each other. When the question arises of whether a transaction is to be countenanced or not, all circumstances must be taken into account which constitute the transaction and give it color. Otherwise an incomplete picture would be created. Now it is precisely the character of the interested party and his motive and purpose that contribute to giving an individuality to each individual transaction. Participation in a legal transaction which offends good morals stigmatizes the party who seeks a profit from it in a manner consistent with healthy national and popular feelings and exposes him to the contempt of honest national comrades. The judge must take these legitimate feelings into account. He can only take the responsibility for exposing a party to contempt by rendering a decision when that party has truly deserved it, when the party himself is to blame. This is only the case when the character which the party has displayed is reprehensible and worthy of reproach. Moreover, in evaluating a contract, proceeding from these considerations of a general nature, one must look beyond the content of the contract which indicates a disproportion to the motives of the interested party and the purpose he pursued; one must accordingly ask the question whether the legal transaction, given its entire form as determined in this way, offends healthy national and popular feeling, or, to use the expression of the *Motive* [the drafter's explanation] of the Civil Code (vol. 2, p. 727), whether it offends the sense of decency of all fair and right-thinking persons.

A transaction which leaves the channels of lawful fair exchange in which both parties' interests are correctly reflected will only come into being where wholly particular and irregular circumstances are present which trick the weaker party into entering such an unfair contract. Whoever in commercial life knowingly uses the weaker position of another to obtain an excessive profit displays impermissible self-interestedness and thereby acts reprehensibly. However, one also offends healthy national and popular feeling when he maliciously or through grossly negligent indiscretion ignores the fact that the other party is consenting to harsh conditions only because of the difficulties of his situation. One who will not see and who obtains advantages in this way which are not justified by the state of affairs must resign himself to being treated as one who acts knowingly.

The judge initially has to decide, in adjudicating such a disputed case, whether a striking disproportion between performance and counterperformance is present and to what extent this is the case. The degree of this disproportion is an important source of knowledge about the character of the party accepting the advantage. It can be so large that it forcefully suggests the conclusion of the contract through knowing or grossly

negligent use of some factual circumstance impinging on the other contracting party.

The contemporary conception of social and commercial life moves in a particularly sharp manner against a self-interest of an individual national comrade which is disadvantageous to the whole; it prosecutes the struggle against such a mental attitude with all means at its command, in the area of criminal law as in that of civil law. This conception provides correct interpretation and application of the statutes, even as they are set forth. For in this way all cases of this type are to be understood, cases which in their entire form conflict with healthy national and popular feeling and with the interests of the national popular community. Moreover, a proof limited to the objective content of the contract, which did not consider the character of the interested parties and particularly that of the party seeking the advantage, would not only contradict the existing law of § 138, but would also be incorrect by reason of its incompleteness and a false application of the general concept of proper conduct.

For commercial life, the careful and prudent conduct which is an essential condition for the welfare of the national whole, and the security of commercial legal transactions is imperatively required. Pertaining to this security is, in the first place, fidelity to contracts. Accordingly, the invalidity of a contract which has been concluded ought to be declared only with care and circumspection. Thus, judicial decisions concerning the application of § 138 have with good reason been disposed to grant such requests only after careful proof of the totality of circumstances of the individual transaction, circumstances pertaining both to persons and to things. The decisions have been wary of following the path of “*laesio enormis*” (rescission of sale for disproportion of more than half) of Roman general law, a path expressly abandoned by the legislator of the Civil Code as well (*Motive*, vol. 2, p. 321). Moreover, an effective device in the struggle against reprehensible self-interestedness is indicated by the consideration that not only knowing exploitation of the other contracting party, but also malicious or grossly negligent ignorance of the existence of a critical situation by the contracting party who enjoys the advantage may, in conjunction with the disproportion, lead to the invalidity of the legal transaction.”

**Note.** As mentioned earlier, judges during the Third Reich would sometimes use terms drawn from Nazi ideology which showed their allegiance to the regime and which may or may not have had anything to do with their decision. One of them was *gesunde Volksempfindungen* translated here as “healthy national and popular feeling.” According to § 2 of the Criminal Code of 1935 (*Strafgesetzbuch*), a person was punishable if he “commits an act which either the statute declares to be punishable or which deserves punishment according to the basic principles of a criminal statute or according to healthy national and popular feeling.” In his commentary on this section, Schönke explained that “[h]ealthy national and popular feeling means the natural feeling for law of all fair and right thinking national comrades (*Volksgenossen*).” (Adolf Schönke, *Strafgesetzbuch für das deutsche Reich Kommentar* (1944), p. 23, to § 2.) After the allied victory, the Control Council of the Allies which

administered Germany promulgated a law prohibiting punishment of acts on the grounds that they violated *gesunde Volksempfindungen*. (Military Government – Germany, United States Zone, Law no. 1, Ordinance No. 7, art. 4, Oct. 18, 1946, in Leon Friedman, *The Law of War, A Documentary History* 1 (1972), 913.)

Today, however, the Nazi terminology appears superfluous to the principle at stake. German courts continue to give relief under § 138(1) of the Civil Code when a party not only took a disproportionate advantage but exhibited a “reprehensible character” by so doing as in the next case. Consider what, if anything the requirement of immoral behavior adds to the requirement that he must have taken a disproportionate advantage.

**Bundesgerichtshof, November 9, 1961, BB 1962, 156**

“The conclusion of a contract of loan for over 20,000 DM provided the lender with an ‘agreed profit’ of 750 DM per month. This profit was, in reality, an interest rate on the loan of 45 percent annually. Because of the amount of the agreed interest rate, a striking disproportion did exist between performance and counter-performance. However, an offense to good morals and hence the invalidity of the contract under § 138 par. 1 of the Civil Code can only be found where, in addition to the objective disproportion of the two performances, the reprehensible character of the lender at the conclusion of the contract can be established . . .

A high rate of interest going beyond all reasonable measure itself clearly indicates that the defendant has a character that merits disapproval. An interest charge of 45 percent should be condemned . . . because an acceptance of it has an unhealthy influence on the capital market and also creates the danger of causing the financial collapse of the debtor, which actually occurred in this case soon after the conclusion of the contract. The question of whether an interest rate of 45 percent can accordingly make a contract of loan invalid by itself need not be answered. In this contract, the parties agreed not only to the high interest charge, but also to security for the loan which was high to an entirely uncustomary degree: in addition to a note for the entire sum borrowed, payment of which was guaranteed by his wife, it included the conveyance for security of the debt of a small store and six oil paintings. One who offers security of this amount can always obtain credit at the normal bank rate of interest and does not need to pay a 45 percent interest charge. Thus it was forcibly brought to the attention of the defendant that only wholly particular circumstances could have induced the general debtor (the borrower) to conclude a contract of loan on such terms. Either the general debtor must have been in a difficult position which prevented him from obtaining credit on normal terms, or the transaction for which he needed credit must have been so dubious that a credit institution would not finance it . . .

If these considerations – whether relating to the entire economic position of the general debtor (the borrower) or to the nature of his transaction – which come forcibly to one’s attention, were unknown to the

defendant, then they were carelessly ignored, his sole concern was to procure himself a wholly uncustomary profit on his money. The contract of loan must be held to offend good morals because of this heedless struggle for profit. That the general debtor himself offered this interest rate and security does not affect this result. Neither can the defendant make the objection that it was necessary for the general debtor, because of his difficult economic position or the type of transaction he intended, to accept a loan on such harsh terms." [citations omitted]

**Note.** According to the court, the borrower could have received normal credit terms elsewhere because he could offer as security a small store and six oil paintings. It does not discuss the value of the store, or the borrower's equity in it, or the value of the paintings. It does not explain why a person who could have obtained credit on normal terms and seems to have had none of the weaknesses mentioned in § 138(2) would have agreed to the terms so onerous if he could get normal terms elsewhere. Consider what a court should do if he could not have received normal terms because of his poor credit status. See *Carboni v. Arrospide*, above.

## French Law

### French Civil Code

#### ARTICLE 1106

A contract is synallagmatic where the parties undertake reciprocal obligations in favour of each other. It is unilateral where one or more persons undertake obligations in favour of one or more others without there being any reciprocal obligation on the part of the latter.

#### ARTICLE 1168

In synallagmatic contracts, a lack of equivalence in the acts of performance of the parties is not a ground of nullity of the contract, unless legislation provides otherwise.

#### ARTICLE 1674

If the seller receives less than five-twelfths of the value of immovable property, he can have the sale set aside even if he has expressly renounced this right in the contract and stated that he was making a gift of the excess value.

#### ARTICLE 1681

In the event that an action in rescission is permitted, the buyer has the choice either to return the object and recover the price which he paid, or keep the estate and pay the rest of the just price, deducting one-tenth of the total price.

**Note.** Articles 1674 and 1681 were contained in the Code as it was originally enacted. As noted earlier, these texts preserved the remedy given by older French law and by the Roman text C. 4.44.2, which spoke only of a remedy for sellers of land. Special statutes have given a remedy to buyers of fertilizer, seeds, and fodder who pay a quarter more than their

value;<sup>1</sup> victims of sea<sup>2</sup> or aviation accidents<sup>3</sup> who pay an unfair amount for rescue or salvage; and those who sell artistic or literary property for less than five-twelfths its value.<sup>4</sup>

French courts have also given relief for mistake, fraud, and duress when prices are disproportionately high or low. In the cases below, they did so although, according to the Civil Code, as it was then, relief for mistake was to be given for an error in substance of an object (art. 1110), relief for fraud for “an artifice such that the other party clearly would not have entered into it had it not been employed” (art. 1116), and relief for duress when a “reasonable person” would “fear that his body or fortune is exposed to a considerable and present harm” (art. 1113). The provisions governing mistake, fraud, and duress were modified by Ordonnance no. 2016–131 of February 10, 2016 by the following articles.

## French Civil Code

### ARTICLE 1136

A mistake as to value is not a ground of nullity where, in the absence of a mistake about the essential qualities of the act of performance, a contracting party makes only an inaccurate valuation of it.

### ARTICLE 1137

Fraud is an act of a party in obtaining the consent of the other by scheming or lies. The intentional concealment by one party of information, where he knows its decisive character for the other party, is also fraud.

### ARTICLE 1140

There is duress where one party contracts under the influence of a constraint which makes him fear that his person or his wealth, or those of his near relatives, might be exposed to considerable harm.

### ARTICLE 1141

A threat of legal action does not constitute duress, except where the legal process is deflected from its proper purpose or where it is invoked or exercised in order to obtain a manifestly excessive advantage.

### ARTICLE 1142

Duress is a ground of nullity regardless of whether it has been applied by the other party or by a third party.

### ARTICLE 1143

There is also duress where one contracting party exploits the other's state of dependence and obtains an undertaking to which the latter would

1. Law of July 8, 1907, D.P. 1908.IV.173, as amended by Law of July 8, 1937, D.P. 1938.IV.168.

2. Law of April 29, 1916, art. 7, D.P. 1919.IV.IV. 285, current version Law of July 7, 1967, art. 15, D.S.L. 1967.258.

3. Law of May 31, 1925, art. 57, 1925 D. P.IV.41, 45, current version in Civil Aviation Code (*Code de l'aviation civile*) art. L. 142–1, Decree of March 31, 1967, D.S.L. 1967.184.

4. Law of March 11, 1957, art. 33, D.L. 1957.102, 104.



not have agreed in the absence of such constraint, and gains from it a manifestly excessive advantage.

**Note.** Under the new Article 1136, “[a] mistake as to value is not a ground of nullity where, in the absence of a mistake about the essential qualities of the act of performance . . . .” Under the new Article 1143, “[t]here is also duress” when one party “exploits the other’s state of dependence” and “gains from it a manifestly excessive advantage.” In reading the following cases, consider whether the courts were giving relief for mistake, fraud, and duress, as these terms were originally defined by the Code, or whether they were doing so because the price was unfair. Consider whether a court should give relief in these cases after the amendments to the Code.

**Cour de cassation, ch. req., April 27, 1887, D. 1888.I.263**

On September 22, 1886, Fleischer, captain of the steamship *Rolf*, whose ship was stuck in the sands of the Bay of the Seine, was about to lose both his ship and cargo. He agreed to pay 18,000 francs for the services of a tug boat, which was the amount that the captain of the tug fixed as the value of salvage. He only escaped a total loss by agreeing to this amount. The *Tribunal de commerce* of Rouen held that Fleischer only had to pay 4,190 francs for the services he had received. The *Cour de cassation* upheld that decision. It said that according to “article 1108 of the Civil Code the consent of the person who obligates himself is an essential condition for the validity of an agreement; as, when the consent is not free, when it is only given because of fear inspired by a considerable and present evil to which the promisor’s person or fortune is exposed, the contract concluded in these circumstances is infected with a defect that renders it voidable . . . .’ The decision under appeal finds that the captain of the *Rolf* only agreed to the contract now in litigation in order to save his ship, which otherwise would have very shortly foundered and have been lost . . . [He] was compelled to enter into the agreement forced upon him by the abuse of his desperate situation only after having vainly argued with the captain of the *Arbeillei* . . . .”

**Cour de cassation, ch. req., January 27, 1919, S. 1920.I.198**

“Whereas gratuitous payments made between living persons or by testament must be the free expression of the donor’s own independent will; as it is the task of the courts to invalidate such gratuities when the donor’s consent was extorted by force; whereas in the judgment under appeal it was found as a fact that Antoine Duvoisin, a paralyzed old man, weakened by illness, confined to bed, and abandoned by the members of his family, was at the mercy of Mr. and Mrs. Vigneron, his *métayers* [tenants of a farm who pay rent in kind], and that the threat they made not to continue their services to him unless he consented to give them his goods was of a kind to inspire such a fear in him that he found it impossible to resist their demand; as proof of constraint can also be found in the fact that, according to the decision under review, Antoine Duvoisin answered the notary who



was drawing up the contract and had asked if he consented, by saying ‘I must’ (*Il le faut bien*); as the decision under review also found that the pressure applied by the Vignerons was made more apparent by a series of later actions in which Antoine Duvoisin made gifts to his *métayers* to assure himself of their services” the decision of the lower court invalidating the gratuitous payments is upheld.

**Cour d’appel of Douai, June 2, 1930, Jurisprudence de la Cour d’Appel de Douai 82, 183**

“Lawniezak has taken an appeal from the decision of the court of d’Avesnes ... which ordered him to pay the sum of 60,000 francs to Hautmont for damages on account of an accident for which Lawniezak was adjudged liable ... He demands this decision be modified, claiming that Hautmont, in a contract dated July 3, 1930 and signed by the parties, declared him to be discharged from the consequences of the accident, this being pursuant to a settlement which set 1,500 francs as the amount receivable by the said Hautmont for all damages ...

[J]udicial decisions have consistently affirmed that fraud can be established by all methods of proof including presumptions ... [I]n this case, this proof has been made by clear, weighty, and consistent presumptions ... [T]he contract itself contains the proof of the fraudulent maneuvers by means of which it was obtained by the *Caisse d’Assurances Mutuelles* ... [I]t is certain that Hautmont, without taking leave of his senses, would not have given up for 1,500 francs the benefits of a judgment which entitle him to 60,000 francs in damages when Lamy, in a contract which appears in his files, had bound himself to advance all his expenses and to claim nothing in return if the case were lost ... [I]t is evident that the insurer took advantage of the state of depression of Hautmont – a state established by experts appointed by the court without the need even arising to turn to the even more conclusive opinion of Dr. Rouges de Fursac, whose authority is incontestable – in order to extort a waiver of rights by inspiring the spurious fear in him of fees which in any event he would not have had to pay ... .”

**Cour d’appel, Paris, January 22, 1953, J.C.P. 1953.II.7435**

S. sold three seventeenth-century paintings of the Dutch and Flemish schools to *Delvaux* for 250,000 francs each. At trial, experts valued the paintings at 40,000 francs, 45,000 francs, and 55,000 francs. The *Tribunal civil de la Seine* declared the sale void and ordered S. to restore the amount he had been paid by *Delvaux* (400,000 francs) and to pay him 100,000 francs as damages. The *Cour d’appel* upheld this decision, saying “that *Delvaux* thus committed a considerable error in the value of the oil paintings which were offered him, and that fraud is a basis for invalidating a contract when it has produced an error in value ... [T]he facts of the case show that S., who knew *Delvaux* to be lacking in experience, as he recognized in a letter of November 7, 1946, deceived the buyer in the value of the three oil paintings offered ... [T]his deceit has clearly surpassed the exaggeration and hedging permitted to every seller ... [T]he buyer of old paintings, unless he possesses

special knowledge himself, finds himself forced to leave much to the affirmations of the merchant, particularly when the merchant presents himself as one with a reputation guaranteeing honesty and a special technical ability ... [I]n this case, by publicizing his reputation as an 'art critic, expert on old paintings, arbitrator at the *Tribunal de commerce de la Seine*, member of the French Society of Literature, Officer of Public Education,' S. obligated himself to demonstrate competence and probability and, in any event, renounced the use of any deceit as to Delvaux, an uninstructed buyer who placed a particular confidence in him because of his reputation ... [T]he circumstances show that S. only used this reputation, and particularly his title as arbitrator at the *Tribunal de commerce*, which he held at the time, for the purpose of capturing Delvaux's confidence ... [T]he letter of S. cited above, written several days after the sale, is indicative of the procedures he used with regard to Delvaux ... [T]o hold on to Delvaux, who was disturbed by the valuations of experts, S. did not hesitate to boast of his 'long experience as an expert recognized by the government, an art critic, and a correspondent with all the journals of the fine arts both in France and abroad,' and of his large fortune, nor did he hesitate to present himself as 'often called to act as judge of the false opinion of ignorant experts who give themselves titles which they do not really possess,' and to affirm that the paintings sold 'have an international value' ..."

**Cour d'appel, Paris, October 14, 1931, D. 1934.II.128**

In a contract with *Ciment Verre, Marchand et fils* agreed to demolish reinforced concrete tanks at a price of 100 francs per cubic meter. The trial court held *Marchand et fils* liable, finding that "*Ciment Verre* was able to believe that *Marchand et fils* possessed all the means of demolition appropriate for any concrete of this type, which in this case turned out to be of a special kind of particular hardness, a fact which *Marchand and fils* should have taken into account before entering into the agreement." The *Cour d'appel* overturned this decision. It said: "[T]here is no indication that *Marchand et fils*, who by profession were suppliers of sand, gravel and cement and not owners of a demolition business, were aware when they bound themselves to the agreement of the special difficulties inherent in the relationship of *Ciment Verre* to the *Brasseries Karcher*, even though at the time of construction they had furnished some of the materials in which they deal ... [O]n its part, *Ciment Verre*, having done the construction, was aware of the special nature of the building and the very particular hardness of the cement which they had mixed and the particularly high percentage of steel added to the cement because of the purpose for which the tanks were intended ... [T]he expert report shows that it is improbable that a specialist in reinforced concrete and in tanks such as *Ciment Verre* would not have known of the flagrant and absolute impossibility of performing this demolition at a price of 100 francs per cubic meter ... [T]his substantial difference indicates sufficiently that *Marchand et fils*, in setting the price of 100 francs, perhaps hastily, only had in view the demolition of normal reinforced concrete and that, given the silence intentionally

preserved by *Ciment Verre*, the common intention of the parties only covered concrete of such a nature ... [O]ne must see in this case an error in substance in a quality of the thing which was the object of the contract, an error which a party committed or was induced to commit, and which is sufficient to vitiate the consent of *Marchand et fils*, *Ciment Verre* having only itself to blame both for its silence over the nature of the work and for the fact that it had accepted performance of the work to which it was obligated before ever having contracted with *Marchand et fils* ... ”

**Cour de Cassation, ch. soc., May 4, 1956, J.C.P. 1957.II.9762**

The lower court invalidated a lease between Sanchez-Boxa and Vidal Associates on the ground of an error in substance. The *Cour de cassation* affirmed. It noted that the court below had found that “the rented property is in a dilapidated state, having vast amounts of uncultivated land not mentioned in the contract and important deficiencies in the vineyards and orchards ... but also that the lessee could not have understood the difficulty and the importance of the efforts necessary to put the property in order, and this situation is due to the initial failure of the lessor to give an objective initial presentation of the circumstances,” and the decision adds that “the silence or maneuvers of the lessor to conceal the importance and difficulty of putting the property in order led the lessee into error, and if the lessee had known the true situation, the contract would never have been accepted in its current form and perhaps would never have been accepted at all ... [T]he result of these findings is that Sanchez-Boxa took the lease to the knowledge of the lessor with the view of rapidly putting the property in order, and consequently the decision below could hold, without violating the relevant texts, that there was an error in the substantial qualities of the thing leased, which the judge called its ‘agricultural value’ ... .”

**Cour de cassation, ch. civ., November 29, 1968, Gaz. Pal. 1969.J.63**

Vanden-Borre leased a villa on the Côte d’Azur for the month of July from its owner, Berthon. The lower court held that the lease was void for an error in substance. It ordered the lessor to return the rent paid in advance and to pay damages. The *Cour de cassation* upheld this decision. It noted that “the decision under review states that, standing alone, the lease, taken for the month of July, 1964, at a price of 6,000 francs with additional charges would permit Vanden-Borre to assume that the premises were correspondingly desirable given that the bureau which was Berthon’s agent had told him specifically that this was a comfortably equipped villa ... [H]owever, both the interior and exterior of this villa gave the incontrovertible impression of a general lack of maintenance, the bedding, doors and walls being manifestly in a filthy condition, the furniture being clearly inadequate, and major construction work, undertaken by the *Société Caliqua* in the immediate area of the villa, would disturb the peace and independence of the occupant ... .”

## Chinese Law

With the promulgation of the General Principles of Civil Law (1986), Chinese law adopted two doctrines that remedy unfairness: “obvious unfairness” (显示公平) and the “exploitation of one’s vulnerabilities” (趁人之危). Under Article 54 of the Contract Law (1999) these factors make a contract voidable. According to the Supreme Court’s opinion in GPCL (1988), “obvious unfairness” requires both subjective unfairness and objective unfairness as a requirement, a distinction like that drawn in the United States in discussions of the doctrine of unconscionability. Subjective unfairness concerns what in American law is called “procedural unconscionability”: one party exploits its bargaining advantages over the other. Objective unfairness concerns only the disparity (or gross disparity) between price and value, which is similar to “substantive unconscionability” in American law. Therefore, the two doctrines seem to overlap. Han Shiyuan has claimed that despite the Supreme Court’s opinion, judges applying the doctrine of “obvious unfairness” continued to require only substantive unfairness or objective unfairness.<sup>1</sup> In applying the doctrine of “exploitation of one’s vulnerability” they required procedural unfairness.

In 2017, the General Provisions of Civil Law merged the two doctrines into one which is called the doctrine of “obvious unfairness.” “Obvious unfairness” makes a contract voidable. It appears that both procedural unfairness (exploitation) and substantive unfairness (significant imbalance or gross disparity) are necessary to establish “obvious unfairness”: this provision has been adopted by the Chinese Civil Code. But whether the change in the General Provisions will lead to a change in practice has yet to be seen. Han Shiyuan expects relief for “obvious unfairness” will still be given for substantive unfairness which will depend on an objective standard.<sup>2</sup> According to Han, however, to give relief on that basis is a mistake. He believes that Chinese law should be primarily concerned with relief for procedural unfairness. In his view, to give relief for substantive unfairness through such doctrines as obvious unfairness and change of circumstances circumvents party autonomy and the principle of *pacta sunt servanda*. Consequently, relief should be given only under exceptional circumstances.<sup>3</sup>

Even leading Chinese scholars are still sufficiently under the influence of will theories that they cannot explain why the fairness of a price should matter. Yet the doctrine of “obvious unfairness” has commonly been used to give relief when the price in a contract is unfair.

## Supreme People’s Court’s Opinions on General Principles of Civil Law (1988)

### SECTION 70. EXPLOITATION OF ONE’S VULNERABILITY

The conduct of a party is considered exploitation of one’s vulnerability when he forces the other to make an untruthful declaration of intent and

1. 韩世远 《合同法总论》 Han Shiyuan, *The Law of Contract* (Beijing, 2018), 292.

2. *Ibid.* 52.

3. *Ibid.* 53.

seriously harms the other party's interest by taking advantage of the other party's unfavorable position in order to obtain undue benefit.

#### SECTION 71. OBVIOUS UNFAIRNESS

It is considered obvious unfairness when one party uses its strength or the other party's inexperience to achieve significantly unjust balance between rights and obligations that is contrary to the principle of compensation for equal value.

### Chinese Civil Code

#### ARTICLE 151

When one party exploited situations such as the other's danger, vulnerability or lack of judgment and it resulted in the obvious unfairness of a civil juristic act at the time of its formation, the aggrieved party has the right to request people's court or arbitration agency to avoid such a civil juristic act. (Previously General Provision of Civil Law of People's Republic of China, Article 151.)

**Note.** The Chinese term translated as "civil juristic act" is a Chinese translation of the German term *Rechtsgeschäft*. A *Rechtsgeschäft* is an expression of will by a private person directed to producing a legal result. A contract is a *Rechtsgeschäft* that requires the expression of will of two or more parties.

### **Jinding Corp. v. Jirong Corp., (2014) 民申字第1072号 (2014) Min Shen Zi No.1072**

A product sales agreement was entered between Jinding Corp. (JD) and Jirong Corp. (JR). During the course of transactions, they entered a supplementary agreement that stipulated the equipment payment amount, payment method, timing of delivery. JD Corp. sued for breach of contract because of a 28-day delay in performance. It argued that the supplementary agreement modified the original agreement and was the result of gross misconception, which renders the supplementary agreement voidable.

The Supreme Court held that "[t]he supplementary agreement was the result of careful calculation and market risk allocation given the sudden and rapid increase of the cost of rare-earth magnet materials after the original contract was reached. It is within the range of normal market activities. As such, the supplementary agreement is not voidable."

### **Yang v. Zhang, (2016) 宁03民终801号 (2016) Ning 03 Min Zhong No. 801**

Defendant, a medical doctor, was driving negligently and hit the plaintiff, a pedestrian who owned a bar close by. The defendant quickly examined the plaintiff at the scene. Before the plaintiff could have had a reasonable chance to ascertain the amount of harm suffered, the defendant approached the family and reached a quick settlement and release of liabilities for a fee of RMB 90,000 yuan. The settlement was reached the day after the accident. It turned out the plaintiff suffered brain damage

and severe bone fractures. Damages were assessed at 130,000 yuan at the time of trial and further damages were anticipated. The plaintiff sued to avoid the contract on the ground of gross misconception. The court set aside the contract for both obvious unfairness and gross misconception.

**Shi v. Xia, (2016) 苏09民终3731号 [(2016) Su 09 Min Zhong No. 3731]**

Shi was riding a bike when she was hit by Xia who was backing his tractor. Shi was injured and reached a settlement and release with Xia for 24,000 yuan. It turned out that the medical expenses were 28,000 and nursing fee was 4,000 yuan. Shi sued to set aside the settlement on the ground of misconception.

The court held that there was valid consent and no gross misconception was found.

**Tong Xu v. Liang ZF, (2017) 粤 01 民终 23863 号 [(2017) Yue 01 Min Zhong No. 23863]**

Both the trial and appellate courts held that the price in the stock purchase agreement that assigned 49 percent of the shares of JZG Corp at RMB 3.9 million yuan was conclusive evidence of obvious unfairness of the contract in which the defendant sold the shares at the unreasonably high price to the plaintiff.

It was found that “[t]he company had long been in deficit and had no commercial value and the asset value of the company did not exceed 100,000 yuan. It is clear that the company’s shares were not worth the contract price. The defendant either hid or did not properly disclose the true state of assets and finances of the company and so tricked the plaintiff into making the wrong decision in contracting. This is a violation of the principle of good faith prescribed under article 6 of the Contract Law, which requires that parties shall discharge their rights and obligations in good faith.” “Even when there is a disparity between the contract price and value, the contract is binding contract so long as parties reached the price after proper disclosure of the finances of the company. Here, although the defendant claimed that he had made proper disclosure, he was not able to prove that he had showed the plaintiff documentation that reflect the asset value and finances of the company.” Therefore, the appellate court affirmed that the defendant had not made proper disclosure and violated the principle of good faith. Tong was ordered to return the 390,000 yuan in payment and the stock purchase agreement was avoided.

## **The Draft Common Frame of Reference**

### **ARTICLE II. 7:207 UNFAIR EXPLOITATION**

- (1). A party may avoid a contract if, at the time of the conclusion of the contract:
  - (a). the party was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill; and



- (b). the other party knew or could reasonably be expected to have known this and, given the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or grossly unfair advantage.
- (2). Upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been observed.
- (3). A court may similarly adapt the contract upon the request of a party receiving notice of avoidance for unfair exploitation, provided that this party informs the party who gave the notice without undue delay after receiving it and before that party has acted in reliance on it.

## **The Unidroit Principles of International Commercial Contracts**

### **ARTICLE 1.1 FREEDOM OF CONTRACT**

The parties are free to enter into a contract and to determine its content.

### **ARTICLE 3.10 GROSS DISPARITY**

- (1). A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to
  - (a). the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill; and
  - (b). the nature and purpose of the contract.
- (2). Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing.
- (3). A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that the party informs the other party of its request promptly after receiving such notice and before the other party has acted in reliance on it.

## **c. Chinese Law and the State-Owned Enterprise**

**Zhang v. Jiangsu Performing Arts Group (PAG) & Jiangsu Huayang Corp (H Corp) (2013)** 南京市秦淮区人民法院民事判决书; 2013) 白商初字第231号 [(2013)Bai Shang Chu Zi No. 231]

Jiangyang Corp (J Corp) was owned by four legal persons (corporations) that are state-owned enterprises (SOEs) including PAG and H Corp and eight natural persons including Zhang, the plaintiff.



Zhang sued to avoid a Stock Purchase Agreement (SPG) that sold 69% of J Corp shares owned by PAG and H Corp to Dafeng Corp (D Corp). Zhang claimed that the SPG was reached without proper notice to her and deprived her of her right of first refusal. Also, she alleged that the enforcement of SPG led to the stripping of state assets and harm to state interest because the state assets were severely undervalued. The transaction violated the mandatory regulations in trading state assets. The trade was the result of malicious collusion. In addition, the transaction was a sham transaction that adopted a legitimate means to conceal an illegal purpose.

Summary of facts and legal arguments:

The balance sheet listed J Corp's equity interest as RMB 3,812,877.19 yuan.

J Corp also enjoys the land use right [equivalent to land ownership in China] of 13491.9 square meters.

The purchase price for 69% of the J Corp shares was RMB 345,000 yuan.

The plaintiff was not properly notified of the transaction and failed to exercise her right of first refusal.

The transaction was approved by the state authority. Public announcement was properly made in a state-run newspaper.

The defendants argued that there was no undervaluation of state assets. The numbers in the balance sheet were falsified in order to pass the annual inspection of State Administration of Industry and Commerce (SAIC). The true value of the net assets of J Corp was RMB -1,570,3000 yuan [a negative value], which was the value they used to seek state approval of the transaction. The method used for valuation was cost-plus. Also the valuation and appraisal method excluded the real estate interest of the J Corp.

The plaintiff maintained that the transaction was a result of malicious collusion for the purpose of stripping state assets. The valuation method adopted by the defendants was not among the ones (income method, current market price method, replacement cost method etc.) permitted by the state council's *Regulations on Valuation of State Assets*.

Also, the 69% J Corp shares acquired by D Corp were subsequently traded to the two individual shareholders of J Corp who also own D Corp. Plaintiff presented this fact as evidence for malicious collusion.

The Court held:

1. "Even if we assume that plaintiff was not duly notified of the transaction, right of first refusal is not a mandatory condition for the contract to be valid. Therefore, infringement of right of first refusal does not render the purchase agreement void.
2. The *Regulations on Valuation of State Assets* is an administrative regulation but rules on valuation methods do not constitute a condition for the validity of contract, neither does violation of these rules result in the invalidity of the purchase agreement."

As to whether public interest was harmed, this court held that, in order to guard the safety of transactions, we should emphasize external formalism in determining the validity of civil juristic acts in commerce. Therefore, we should only look at the external forms of the civil juristic act in determining its validity. The sale of the disputed shares was approved by the supervisory authority, followed the procedures such as public announcement, and was properly registered. The forms of the transaction had met the requirements of legal compliance. Defects in valuation method and scope will not necessarily harm public interest.

As to malicious collusion, the plaintiff cannot prove the subjective intention of the defendants and, moreover, no harm to the third party can be proved. Therefore, the alleged malicious collusion does not vitiate the contract.

**Note.** Compare this case with *Tong Xu v. Liang ZF*, (2017)粤 01 民终 23863 号, presented above, and consider why the same the result was not reached.

**Bureau of Forestry of Yi County v. Fang & Fang, (2014) 宣中民四终字第00105号; (2014) Yuan Min Si Zhong Zi No. 00105**

**Facts and Arguments:**

Yi County Timber Company sold various houses and buildings to two individuals Fang Shan and Fang Yusheng for RMB 47,000 yuan.

Zhang Wenqing, the general manager of the timber company, signed the contract and later was found to have received 10,000 yuan from Fang and Fang as a gesture of gratitude for the convenience and help provided to them in the sale process. Zhang was convicted of bribery. Zhang was found guilty of illegally taking a bribe and benefiting the others when disposing state assets.

The Bureau of Forestry, the supervisory government agency of the Timber company, sued on the basis of conviction to avoid the contract. They claimed that the contract sold state assets at a low price and resulted in the loss of state assets.

The Bureau of Forestry also alleged there were procedural defects in the sale. The transaction was not approved by the management of the Timber Company, nor did it receive government approval. There was neither public announcement nor a public bidding process.

**Rulings and the reasoning:**

The court found that the real estate sales agreement was valid. “The defects in internal approval procedures were internal managerial issues of the Timber company and therefore not sufficient to constitute as a defense

to the validity of contract.” The fact that Zhang was found in a criminal proceeding to have received 10,000 yuan is not sufficient by itself to prove that the sale price was suppressed and resulted in stripping of state assets. The bribe took place three years after the contract was concluded and therefore had no causal relationship with the contract. “The Bureau of Forestry failed to prove otherwise and, without evidence to the contrary, the contract is valid without evidence to the contrary.”

**Chen v. Hongta**, 云高二民初字第1号 (2012) [Yun Gao Er Min Chu No.1]; (2013) 民申字第2119号 [(2013) Min Shen Zi No. 2119]

Yunnan Hongta (Hongta) is a state-owned tobacco company that owns 12.32 percent or 65,813,912 state-owned legal person shares [corporate shares] of Yunnan Baiyao (B Corp), a state-owned and publicly traded company. State-owned legal person shares are not usually tradable in the market.

China Tobacco is another state-owned manufacturer of tobacco products and at the same time the regulator of Chinese tobacco industry [otherwise known as the State Administration of Tobacco Monopoly].

The Ministry of Finance exercises the de facto ownership rights on behalf of the state of China Tobacco.

SUMMARY

On January 4, 2009, China Tobacco approved Hongta’s proposal to sell its 12.32 percent shares of B Corp. Per this approval, Hongta was permitted to sell the shares without restrictions.

On August 13 and August 14, 2009, B Corp. publicly announced the intention to trade these shares and issued a call for bidders.

On September 10, 2009, Hongta and Chen Fashu (Chen) concluded a stock purchase agreement at a price of 33.543 yuan per share, and a total price of 2,207,596,050.22 yuan.

Chen rendered the payment within five days of the signing of the contract.

Art. 12 of the Agreement states that “Hongta shall, upon the receipt of payment in full, rapidly complete all the legally required procedural steps related to the trade such as securing state approval and public disclosure of information. Chen shall cooperate in the completion of these measures.”

Art. 30 states that: “This Agreement becomes effective upon signing, but it can only be performed after an approval is received from the regulatory agency of state assets with appropriate authority.”

On September 11, 2009, Hongta sent China Tobacco a request for approval of the transaction that sells the B class Corp shares to Chen. [Though the request to sell the shares had been approved, this particular transaction also needed approval in accordance with Article 30 of the agreement.]

On April 27, 2011, Chen sent Hongta a formal request to transfer the shares. The response from Hongta was that they were still waiting for the

approval from their superior government agency but had not yet received a response.

On December 21, 2011, Chen filed a lawsuit against Hongta in the High Court of Yunnan Province. Chen asked the court to affirm the validity of the contract and to enforce the contractual obligations. Chen also sought to recover the damage from Hongta for breach of contract. By the time the lawsuit was filed, the value per share had gone up to 58.45 yuan/share from 33.543 yuan/share.

On January 17, 2012, China Tobacco formally replied and disapproved the transaction. The reason for the disapproval was to preserve and increase the value of state assets, and to prevent the loss of state assets.

On December 28, 2012, the trial court held that the contract was valid but denied all the other claims. The court reasoned that the contract was legally formed and took effect upon signing. There is no breach of contract because Hongta fulfilled its contractual obligations to seek approval. This approval had not been obtained. Court costs of 16,968,480.02 yuan were to be paid by Chen. Hongta kept both the shares and the money.

Chen appealed to the Chinese Supreme Court claiming that the contract is valid and performance is due. Also, Chen argued that Ministry of Finance is the only appropriate state agency since it, rather than China Tobacco, has the exclusive authority to approve or disapprove the transaction.

There is a departmental regulation by the Ministry of Finance that requires all sales of state assets exceeding 100 million by the tobacco industry to be approved by the Ministry of Finance at the request of China Tobacco.

By the time the appeal was heard on December 5, 2013, the value of the shares reached 6.8 billion yuan.

The Supreme Court held that “[t]he contract had been terminated for failure to satisfy the condition of obtaining state approval. The Ministry of Finance does not have to consider approving the transaction because it was not submitted for approval by China Tobacco. When a contract is terminated, property received under the contract is to be returned. Therefore, Hongta was ordered to return the contract price of 2,207,596,050.22 yuan with interest to Chen.”

**Nanning City Road East Farms v. Teng Meicai**, 南宁市路东养猪场 v. 滕美, **Nanning Municipal Interim. People's Ct. 2012, (2012)** 南市民二二终字第397号; [(2012) Nan Shi Min Er Er Zong Zi No. 397]

In a 2012 appellate case regarding a dispute over the rent in a land contract, the appellate court, Nanning Intermediate Court, affirmed the trial court's decision to uphold the lower rent specified in the contract and denied the SOE's claims that the contract was unenforceable because of obvious unfairness and changed circumstances. In this case, a wholly state-owned farm (“the farm”) signed a land contract leasing 4.82-mu of farmland to a then retiring employee, Teng Meicai (“Teng”). The lease was for a fifteen-year term, from 2003 to 2018, at the annual rent of RMB 200 yuan/

mu. The rent was considered at the time of the lawsuit to be below market. The contract provided managing the leased farmland was Teng's new employment. Since his retirement, Teng was categorized as self-employed and had to pay his own social welfare. Teng had since subleased the farmland to others and was using the rent as the main source of income, which was permitted under the contract. The farm had received the rent of RMB 200 yuan/mu until 2011. Then the farm sought to increase the annual rent to RMB 1,500 yuan/mu. When Teng refused to pay the higher rent, the farm sued in 2011 to either terminate the contract or increase the rent to the market level.

The court requested a third party agency to appraise the fair rent of the farmland. It appraised the annual rent at RMB 1,447 yuan/mu for the period of 2011 to 2018. Nevertheless, concurring with the trial court, the appellate court upheld the original terms of the contract and ordered the state-owned farm to perform them. The court invoked the principle of freedom of contract, stating that "contract law protects the parties' freedom to contract voluntarily and whatever terms are agreed by both parties that are not against the law are legally binding." The court further reasoned that modification of a contract requires mutual consent, which was lacking in this case. The court rejected the farm's argument concerning the obvious unfairness of the low price for two compelling reasons. One was that the purpose of the contract was to be interpreted as a subsidy; the other was that there had been a significant disparity in financial capacities between the two parties. The rent constituted the distribution of welfare benefits, as seen by the fact that the farm cut Teng off the welfare benefits by allowing him to live off the leased farmland and to sublease it. Therefore, the RMB 200 yuan/mu rent was not subject to the market rent. Also, having defined the purpose of the contract as a sort of subsidy, neither changed circumstances, obvious unfairness, or impossibility arguments were grounds for relief. The farm argued that terminating the contract or raising the rent is a means to prevent the dissipation of state assets, and the continued performance of the contract will affect the operation of the farm. Therefore, the court had to weigh the public policy of subsidizing a retiring SOE employee against the policy of preserving state assets. The court decided to prioritize the policy that is of greater assistance to the more vulnerable retiring SOE employee. The court reasoned that the farm has substantial financial capacity, while Teng was counting on the 4.82 mu farmland as the main source of his income. Also, the contract had been performed for ten years and only had five years remaining. The continued performance of the contract would have only very limited impact on the farm. Therefore, the court upheld the validity of the contract terms and ordered the farm to continue the performance for the rest of the term.

**Gao Wenjie v. Dingxi City Hee Sea Oil LLC**, 高文杰 v. 定西市熙海油脂有限责任公司; **Dingxi City Interm. People's Ct. 2014; (2014) 定中民二初字第4号 [(2014) Ding Zhong Min Er Cu Zi No.4]**

In a 2014 case, the validity of an asset purchase agreement was challenged when an SOE employee, Gao Wenjie, purchased RMB 6.67 million

yuan worth of state assets at the price of RMB 3.66 million yuan. The SOE at the time, under the direction of the local government, was going through a restructuring process in which the SOE was sold to its employees. [Only employees were allowed to bid and the assets were sold to the highest bidder.] Gao acquired the state assets through an open bidding process under the supervision of the government. His purchase of the corporate assets and an equity interest were also affirmed by the government. The company and the other shareholders denied his equity interest, arguing to affirm the sale would be to encourage the stripping of state assets. The court, however, affirmed the validity of the sale of the equity interest and the asset purchase agreement even though the price was lower than the market value. The court reasoned that both parties agreed that the purpose of the asset sale at the lower price was to implement the state policy of re-settling the former SOE employees after privatization. The *Provisional Rules on Transferring State Shares in Listed Companies by Holders of State Shares* allows holders of state shares to transfer their shares gratuitously to government agencies, public sector organizations, and wholly state-owned enterprises. Such transfers require a feasibility study, financial reports, legal opinions by law firms, development and restructuring plans, protocols to deal with the debts, and approval by the State-owned Assets Supervision and Administration Commission (SASAC).

## 2. Fairness of the Auxiliary Terms

### English Law

#### Consumer Rights Act 2015 c. 1.

##### PART 2. UNFAIR TERMS

#### 61. Contracts and notices covered by this Part

- (1). This Part applies to a contract between a trader and a consumer.
- (2). This does not include a contract of employment or apprenticeship ...

#### 62. Requirement for contract terms and notices to be fair

- (1). An unfair term of a consumer contract is not binding on the consumer.
- (2). An unfair consumer notice is not binding on the consumer.
- (3). This does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.
- (4). A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.
- (5). Whether a term is fair is to be determined –
  - (a). taking into account the nature of the subject matter of the contract, and



- (b). by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends.

### **Law in the United States**

See Uniform Commercial Code § 2-302; Restatement (Second) of Contracts § 208, quoted above.

#### **Weaver v. American Oil Co., 276 N.E.2d 144 (Ind. 1971)**

"In this case the appellee oil company presented to the appellant-defendant lessee, a filling station operator, a printed form contract as a lease to be signed, by the defendant, which contained, in addition to the normal leasing provisions, a 'hold harmless' clause which provided in substance that the lessee operator would hold harmless and also indemnify the oil company for any negligence of the oil company occurring on the leased premises. The litigation arises as a result of the oil company's own employee spraying gasoline over Weaver and his assistant and causing them to be burned and injured on the leased premises. This action was initiated by American Oil and Hoffer (Appellees) for a declaratory judgment to determine the liability of appellant Weaver, under the clause in the lease.

It will be noted that this lease clause not only exculpated the lessor oil company from its liability for its negligence, but also compelled Weaver to indemnify them for any damages or loss incurred as a result of its negligence . . .

This is a contract, which was submitted (already in printed form) to a party with lesser bargaining power. As in this case, it may contain unconscionable or unknown provisions which are in fine print. Such is the case now before this court.

The facts reveal that Weaver had left high school after one and a half years and spent his time, prior to leasing the service station, working at various skilled and unskilled labor oriented jobs. He was not one who should be expected to know the law or understand the meaning of technical terms. The ceremonious activity of signing the lease consisted of nothing more than the agent of American Oil placing the lease in front of Mr. Weaver and saying 'sign,' which Mr. Weaver did. There is nothing in the record to indicate that Weaver read the lease; that the agent asked Weaver to read it; or that the agent, in any manner, attempted to call Weaver's attention to the 'hold harmless' clause in the lease. Each year following, the procedure was the same. A salesman, from American Oil, would bring the lease to Weaver, at the station, and Weaver would sign it. The evidence showed that Weaver had never read the lease prior to signing and that the clauses in the lease were never explained to him in a manner from which he could grasp their legal significance. The leases were prepared by the attorneys of American Oil Company, for the American Oil Company, and the agents of the American Oil Company never attempted to explain the conditions of the lease nor did they advise Weaver that he should



consult legal counsel, before signing the lease. The superior bargaining power of American Oil is patently obvious and the significance of Weaver's signature upon the legal document amounted to nothing more than a mere formality to Weaver for the substantial protection of American Oil.

Had this case involved the sale of goods it would have been termed an 'unconscionable contract' under sec. 2–302 of the Uniform Commercial Code . . .

The facts of this case reveal that in exchange for a contract which, if the clause in question is enforceable, may cost Mr. Weaver potentially thousands of dollars in damages for negligence of which he was not the cause[,] Weaver must operate the service station seven days a week for long hours, at a total yearly income of \$5,000–\$6,000. The evidence also reveals that *the clause was in fine print and contained no title heading* which would have identified it as an indemnity clause. It seems a deplorable abuse of justice to hold a man of poor education, to a contract prepared by the attorneys of American Oil, for the benefit of American Oil which was presented to Weaver on a 'take it or leave it basis' . . .

We do not mean to say or infer that parties may not make contracts exculpating one of his negligence and providing for indemnification, but it must be done *knowingly* and *willingly* as in insurance contracts made for that very purpose."

### French Law

#### French Civil Code

##### ARTICLE 1170

Any contract term which deprives a debtor's essential obligation of its substance is deemed to be not written.

**Note.** The wording of this provision was based on the language used by the *Cour de Cassation* in the following two cases.

**Cour de cassation, ch. comm., October 22, 1996, Bull. civ. IV no. 261, D. 1997.Jur.121**

Banchereau hired Chronoplast to deliver envelopes containing its response to a tender offer. Chronoplast failed to deliver them within the time agreed. A term of the contract limited Chronoplast's liability to the price for carrying the envelopes.

"[G]iven that, acting as a specialist in rapid carriage, guaranteeing the reliability and speed of its service, Chronoplast had undertaken to deliver the envelopes of Banchereau within a specified period of time, and given the breach of that essential obligation, the clause limiting liability under the contract, which contradicted the scope of the undertaking given, was deemed not to be written," the decision of the *Cour d'appel* in favor of Chronoplast is overturned.<sup>1</sup>

1. Translation by Philippe Stoffel-Munck, "The Revolution in Unfair Terms," John Cartwright and Simon Whittaker, eds,

*The Code Napoléon Rewritten French Contract Law after the 2016 Reforms* (Oxford, 2017), 145 at 147.

**Cour de cassation, ch. comm., June 29, 2010, Bull. civ. IV no. 115, JCP E 2010 n.1790**

Oracle contracted to deliver the final version (V12) of production management software to Faurecia, a manufacturer. Oracle failed to perfect the software. A term in the contract limited its liability for damages.

“[A] limitation of liability clause is deemed not to be written only if it contradicts the essential obligation undertaken by the debtor[.] [T]he judgment below states that although Oracle has breached an essential obligation of the contract, the amount of the compensation, negotiated under a term that the agreed prices reflect the allocation of risk and the resulting limitation of liability, was not derisory[.] . . . Oracle has granted a discount rate of 49%[.] [T]he contract provides that Faurecia will be the main European representative participating in a committee to conduct a global study to develop an Oracle product for the automotive sector and will benefit from preferential treatment when defining the requirement necessary for a continuous improvement of the Oracle automotive solution for V12 version of Oracle’s applications[.] [T]he *Cour d’appel* inferred from this that the limited liability clause did not empty Oracle’s obligations of any substance and thus legally justified its decision . . . .”<sup>2</sup>

**French Civil Code**

ARTICLE 1171

Any term of a standard-form contract which creates a significant imbalance in the rights and obligations of the parties to the contract is deemed not written.

**Note.** The wording of this provision was based on that of the following statute.

**Law on Consumer Practices Article L. 442–6, Part I, par. 2  
Commercial Code<sup>3</sup>**

I. Any producer, merchant, manufacturer or person registered in the trades directory is liable for the following acts and is required to compensate the loss caused thereby:

...

(2) Subjecting or attempting to subject a trading partner to obligations which create a significant imbalance in the rights and obligations of the parties; ...

**Cour de cassation, ch. civ., 2<sup>e</sup> ch. civ. July 5, 2018, pourvoi no. 17–14.731**

“The forfeiture guarantee on which the insurance company SMA prevailed . . . is drafted as follows:

‘if the insured makes false declarations, and in particular exaggerates the amount of damages, claims the destruction of goods that did not exist at the time of the accident, dissimulates or conceals all or part of the

<sup>2</sup>. Translation by Stoffel-Munck, “Revolution in Unfair Terms”, 148.

<sup>3</sup>. Translation by Stoffel-Munck, “Revolution in Unfair Terms”, 153.

goods insured, knowingly fails to disclose or claims the existence other insurance covering the same risks, uses in support documents that are inaccurate or means that are fraudulent, the insured completely forfeits all right to an indemnity on all of the risks of the accident.’

In the present case is it established that the company Etablissements Y . . . submitted to the tribunal de commerce on November 20, 2014, a liability claim against its insurer [for business losses] . . . with documentation of a kind to deceive the insurance company concerning the economic and financial situation of the insured . . . .

...

In the first place, every clause that deprives the essential obligation of the debtor of its substance is deemed to be not written. In this case, the forfeiture clause inserted in the contract of insurance, which deprives the insured of all right to indemnification on the entirety of the risks the accident if it uses in support documents that are inaccurate or means that are fraudulent, leads by its generality to depriving the insurer’s obligation to indemnify of its substance because the insured loses all right to indemnification even when false declarations or fraudulent means were used to obtain indemnification of one of the risks guaranteed. Such a clause, which attaches excessive consequences to the use of false declarations and fraudulent means should be deemed not to be written. By applying that clause, notwithstanding, despite its general character, the *Cour d’appel* violated article 11312 of the Civil Code as redacted prior to the ordinance of February 10, 2016.

In the second place, an act that subjects or attempts to subject a trading partner to obligations that create a significant disequilibrium in the rights and obligations of the parties makes the author liable and obligates him to repair the damage caused. The forfeiture clause inserted in the insurance contract deprives the insured of all right to indemnity as to all the risks of the accident if he uses documents that are inexact or means that are fraudulent. Such a clause, on account of its generality, creates a significant disequilibrium in the rights and obligations of the parties to the detriment of the insured because the latter loses all right to indemnification even when the false declarations and fraudulent means were only used to obtain indemnification for one of the risks guaranteed. Such a clause necessarily makes the insurer liable with the result that he evade such a liability. The *Cour d’appel* misunderstood article L. 442–6, I, 2° of the Code de commerce.”

### German Law

#### German Civil Code

##### § 307. CONTROL OF THE CONTENT

- (1). Provisions in standard form terms (*allgemeine Geschäftsbedingungen*) are ineffective when they disproportionately disadvantage the contract partner of the party who employs them in violation of the commands of good faith (*Treu und Glauben*). A disproportionate disadvantage may be shown when the provision is not clear and understandable.

- (2). When in doubt, a disproportionate advantage is to be found when a provision
  1. is not in accord with the underlying ideas (*wesenliche Grundgedanken*) of statutory provisions from which it deviates, or
  2. so limits essential rights and duties which arise from the nature of the contract so as to endanger the attainment of the purpose of the contract.

**Bundesgerichtshof, February 8, 2012, NJW 2012, 1431**

On April 17, 2007, the parties entered into a contract for the use of a fitness center beginning May 1. The contract was to last for twenty-four months and, unless three months notice was given, for an additional twelve months. The monthly payment for use was 44.90 euros. Paragraph 7 of the contract allowed the user to terminate by giving notice “if he could not use the center for the remainder of the term for reasons of illness. For the notice to be effective it must be given promptly, at the latest within two weeks after the user becomes aware of the legal grounds for termination and the notice must be accompanied by a medical certification which fully sets forth the illness/health impairment that prevents the use.” The user gave notice on July 24, 2008, that he would be unable to use the fitness center for health reasons, accompanied by medical certification. The fitness center apparently refused to accept this notice because the certification accompanying it was too unspecific. This court and the lower court agreed that the user had not given notice as required by the contract. The fitness center sued for the fees due for the remainder of the term ending April 30, 2009. The defendant claimed that the clause was invalid under § 307 of the German Civil Code.

The court held that in principle, it was permissible to prohibit users from terminating their contracts within a two-year period. Nevertheless, paragraph 7 of the contract violated § 307.

“According to § 307(1) sentence 1 of the German Civil Code, provisions in standard form terms are ineffective when they disproportionately disadvantage the contract partner of the party who employs them in violation of the commands of good faith. A clause is disproportionate in the sense of § 307(1) sentence 1 when the party who employs it formulates the contract solely with his own end in view and seeks his own interests unfairly at the expense of the other party by without adequately taking the other party’s interests into account by providing appropriate compensation.

In a contract for the use of a fitness center, a circumstance [warranting termination] cannot only be the illness of the user. There may be other grounds that do not lie within his sphere of responsibility which would prevent further use of the [center] until the end of the agreed term of the contract. For example, the occurrence of a pregnancy could be a ground for the premature termination of the contract.

The plaintiff contends that notice is dependent on a medical certification which described the kind and the extent of the illness. Certainly, the management of a fitness center has a legitimate interest in recognizing in

principle the production of medical certification in a notice based on illness from its users in order to prevent a misuse of the right of notice permitted him. [citation omitted] Nevertheless, the appeal correctly observes that this interest of the plaintiff is already served by a medical certification which states that athletic activity by the user is no longer possible. The interest of the plaintiff in protecting itself against unjustified notices does not justify requiring from the user information about the concrete nature of the illness. For in principle, trust can be placed in the certification of a doctor.”

### Chinese Law

#### **Chen Wei v. Amazon, (2014) 三中民终字第09383号**

Chen Wei found a good deal on Amazon and placed an order to purchase a 32 inch LED TV for RMB 161.99 yuan. The order was later cancelled and Amazon alleged that the TV was out of stock and that there was no contract between the two parties according to Amazon’s Terms of Use [which were the same as the one in the previous case].

The appellate court held that “[t]he boilerplate terms in the Terms of Use are not enforceable, that showing of prices and products on the website is sufficient to constitute an offer, and that placing an order is an effective way to accept the offer.” The court held that Chen was not bound by the boilerplate. The court reasoned that “[t]he website did not require the consumers to read and agree the Terms of Use. In addition, the Terms of Use were placed at the bottom of the webpage in darker but not bold fonts, which was not conspicuous enough to draw consumers’ attention. A click was needed for consumers to read the Terms of Use. Overall, this court found that Amazon’s duty to reasonably and sufficiently notify consumers of the Terms of Use was not properly fulfilled. As such, the contract was effective upon acceptance and Amazon is liable for breach of contract.”

**Note.** Compare this case with one considered earlier, in which, on similar facts, the court reached the same result, not on the grounds that the Terms of Use are not binding, but on the grounds of precontractual liability. *Yang Fan v. Amazon*, Third Intermediary Court of Beijing (2017), (2017) 京民终1120号.

**Note.** In response to the surge of online shopping disputes, the Chinese Civil Code settled the dispute over the timing of contract by providing that contract was concluded the moment the order was placed online (Chinese Civil Code, Article 491).

### The Law of the European Union

#### **Directive of the European Council on Unfair Terms in Consumer Contracts, 93/13/EEC, April 5, 1993**

##### ARTICLE 1

- (1). The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.

- (2). The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive.

#### ARTICLE 2

For the purposes of this Directive:

- (a). “unfair terms” means the contractual terms defined in Article 3;
- (b). “consumer” means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;
- (c). “seller or supplier” means any natural or legal person who, in contracts, covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.

#### ARTICLE 3

- (1). A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance to the parties’ rights and obligations arising under the contract, to the detriment of the consumer.

- (2). A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a preformulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

- (3). The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.

#### ARTICLE 4

- (1). Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.
- (2). Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to

the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, insofar as these terms are in plain intelligible language.

#### ARTICLE 5

In case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7 (2).

#### ARTICLE 6

- (1). Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.
- (2). Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.

#### ARTICLE 7

- (1). Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.
- (2). The means referred to in paragraph 1 shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.
- (3). With due regard for national laws, the legal remedies referred to in paragraph 2 may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms.

#### ARTICLE 8

Member States may adopt or retain the most stringent provisions compatible with the treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.



## ARTICLE 9

The Commission shall present a report to the European Parliament and to the Council concerning the application of this Directive five years at the latest after the date in Article 10(1).

## ARTICLE 10

- (1). Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 31 December 1994. They shall forthwith inform the Commission thereof.

These provisions shall be applicable to all contracts concluded after 31 December 1994.

- (2). When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
- (3). Member States shall communicate the main provisions of national law which they adopt in the field covered by this Directive to the Commission.

## ARTICLE 11

This Directive is addressed to the Member States . . .

## ANNEX

Terms Referred to in Article 3(3)

- (1). Terms which have the object or effect of:
  - (a). excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
  - (b). inappropriately excluding or limiting the legal rights of the consumer *vis-à-vis* the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;
  - (c). making an agreement binding on the consumer whereas provision of services by seller or supplier is subject to a condition whose realization depends on his own will alone;
  - (d). permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
  - (e). requiring any consumer who fails to fulfill his obligation to pay a disproportionately high sum in compensation;

- (f). authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
- (g). enabling the seller or supplier to terminate a contract of indeterminate length without reasonable notice except where there are serious grounds for doing so;
- (h). automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;
- (i). irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
- (j). enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
- (k). enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
- (l). providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
- (m). giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;
- (n). limiting the seller's or supplier's obligation to respect commitments undertaken by agents or making his commitments subject to compliance with a particular formality;
- (o). obliging the consumer to fulfill all his obligations where the seller or supplier does not perform his;
- (p). giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;
- (q). excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

- (2). Scope of subparagraphs (g), (j), and (l)
- (a). Subparagraph (g) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.
  - (b). Subparagraph (j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.  
Subparagraph (j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.
  - (c). Subparagraphs (g), (j) and (l) do not apply to:
    - transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control;
    - contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;
  - (d). Subparagraph (l) is without hindrance to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.

**Note on the law in England, France and Germany.** All three countries have enacted legislation giving effect to the provisions of this Directive.<sup>1</sup> In each case, this legislation supplements laws that were previously enacted that govern unfair terms.

### The Draft Common Frame of Reference

#### ARTICLE II. 9:402 DUTY OF TRANSPARENCY IN TERMS NOT INDIVIDUALLY NEGOTIATED

- (1). A person who supplies terms which have not been individually negotiated has a duty to ensure that they are drafted and communicated in plain, intelligible language.

1. Unfair Terms in Consumer Contracts Regulations 1994, S.I. 1994/3159 (England); Law 95–96 of Feb. 1, 1995, Code de la consommation art. L. 132–1 (France); Gesetz zur Änderung des AGB-Gesetzes, BGBl I 1996, 1013 (Germany).

- (2). In a contract between a business and a consumer a term which has been supplied by the business in breach of the duty of transparency imposed by paragraph (1) may on that ground alone be considered unfair.

ARTICLE II. 9:403 MEANING OF “UNFAIR” IN CONTRACTS BETWEEN A BUSINESS AND A CONSUMER

In a contract between a business and a consumer, a term [which has not been individually negotiated] is unfair for the purposes of this Section if it is supplied by the business and if it significantly disadvantages the consumer, contrary to good faith and fair dealing.

ARTICLE II. 9:404 MEANING OF “UNFAIR” IN CONTRACTS BETWEEN NON-BUSINESS PARTIES

In a contract between parties neither of whom is a business, a term is unfair for the purposes of this Section only if it is a term forming part of standard terms supplied by one party and significantly disadvantages the other party, contrary to good faith and fair dealing.

ARTICLE II. 9:405: MEANING OF “UNFAIR” IN CONTRACTS BETWEEN BUSINESSES

A term in a contract between businesses is unfair for the purposes of this Section only if it is a term forming part of standard terms supplied by one party and of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.

ARTICLE II. 9:406: EXCLUSIONS FROM UNFAIRNESS TEST

- (1). Contract terms are not subjected to an unfairness test under this Section if they are based on:
  - (a). provisions of the applicable law;
  - (b). international conventions to which the Member States are parties, or to which the European Union is a party; or
  - (c). these rules.
- (2). For contract terms which are drafted in plain and intelligible language, the unfairness test extends neither to the definition of the main subject matter of the contract, nor to the adequacy of the price to be paid.

ARTICLE II. 9:407: FACTORS TO BE TAKEN INTO ACCOUNT IN ASSESSING UNFAIRNESS

- (1). When assessing the unfairness of a contractual term for the purposes of this Section, regard is to be had to the duty of transparency under II. – 9:402 (Duty of transparency in terms not individually negotiated), to the nature of what is to be provided under the contract, to the circumstances prevailing during the conclusion of the contract, to the other terms of the contract and to the terms of any other contract on which the contract depends.
- (2). For the purposes of II. – 9:403 (Meaning of “unfair” in contracts between a business and a consumer) the circumstances prevailing during the conclusion of the contract include the extent to which the consumer was given a real opportunity to become acquainted with the term before the conclusion of the contract.

## ARTICLE II. 9:408: EFFECTS OF UNFAIR TERMS

- (1). A term which is unfair under this Section is not binding on the party who did not supply it.
- (2). If the contract can reasonably be maintained without the unfair term the other terms remain binding on the parties.

ARTICLE II. 9:410: TERMS WHICH ARE PRESUMED TO BE UNFAIR IN  
CONTRACTS BETWEEN A BUSINESS AND A CONSUMER

[This article contains a list of terms presumed to be unfair like that in the Annex to the *Directive of the European Council on Unfair Terms in Consumer Contracts*.]

**The Unidroit Principles of International Commercial Contracts**

## ARTICLE 1.1 FREEDOM OF CONTRACT

The parties are free to enter into a contract and to determine its content.

## ARTICLE 2.20 SURPRISING TERMS

- (1). No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.
- (2). In determining whether a term is of such a character regard is to be had to its content, language and presentation.

**IV. EXCUSES FOR NON-PERFORMANCE****1. Impossibility and *Force Majeure***

Suppose you hire a doctor or a lawyer. In the United States, France, and Germany, he is normally liable only if he is negligent. If he is not negligent, he is not liable even if he fails to cure you or win your lawsuit. On the other hand, suppose that you hire someone to transport your goods to a certain destination by a certain date. If he fails to perform, sometimes he is liable even if it was not his fault: for example, if his financial resources are insufficient to hire his crew, or if the crew strikes. But he would not be liable, for example, if war is declared and no ships are allowed to sail. That is so in common law, French law, and German law. And yet jurists in these countries express these conclusions by using very different language.

The language they use traces back to Roman law. It is different because of the different ways in which they altered or deformed Roman law in the process of borrowing from it.

Roman law denied enforcement to some but not all contracts in which performance is impossible. A famous Roman text contained the maxim,

“there is no obligation to the impossible.”<sup>1</sup> A number of texts excuse a party when performance was impossible at the time the contract was made. Nevertheless, if his performance was initially impossible, a party cannot escape if performance is merely beyond his own power. It must be beyond anyone’s power.<sup>2</sup> As later commentators put it, impossibility must be “objective” or “absolute,” not “subjective” or “personal.” Other texts excused a party’s performance if it became impossible after the time it was made. To escape liability, a party then had to prove that he was not at fault. Nevertheless, he could not escape merely because he was not at fault in the ordinary sense of the word. One who borrowed property gratuitously for his own use is liable if he failed to exercise the most scrupulous diligence (*exactissima diligentia*).<sup>3</sup> He was not liable if the property is destroyed by invading enemies or bands of robbers.<sup>4</sup> He was not liable for *vis maior*, that is, for accidents that no one could have prevented.<sup>5</sup> The medieval jurists classified this kind of “fault” as *culpa levissima* – most light fault. From there, one ascended through *culpa levis*, *culpa lata*, and *culpa lator* to *dolus* or intentional wrongdoing, the correct definition of each degree remaining a matter of continual argument.<sup>6</sup> The type of fault for which one was liable was said to depend on for whose benefit the contract was made.

The medieval canon lawyers, however, turned impossibility and fault into basic principles of moral responsibility which the late scholastics then defended on Aristotelian principles. The canonists concluded, after some initial hesitation, that one could not be morally obligated to do the impossible.<sup>7</sup> Such a person was not at fault. In the thirteenth century, Thomas Aquinas used Aristotle’s theory of human responsibility to explain the conclusions of the canonists. Choice was an act of will, and one could only choose what was possible.<sup>8</sup> A promise to do the impossible was not binding.<sup>9</sup> Once impossibility and fault had been interpreted as principles of moral responsibility, it was difficult to harmonize them with the Roman rules. A struggle now began in which the Roman rules were never displaced by Aristotelian principles – as were the rules governing contract formation – nor explained by them – as were the rules governing relief for mistake and unfairness. The late scholastics borrowed the conclusion that one cannot be obligated to keep an impossible promise.<sup>10</sup> They never

1. Dig. 50.17.185.

2. Dig. 45.1.137.

3. Dig. 44.7.1.4.

4. Dig. 13.6.18.pr.

5. Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990), 192–7.

6. E.g., Bartolus de Saxoferrato, *Commentaria Corpus Iuris Civilis* to D. 16.3.32 nos. 13, 16, 26, 27, in *Omnia quae extant opera* (1615).

7. *Glossa ordinaria* to Gratian, *Decretum* (1595), to *dicta Gratiani ante D. 13, c. 1*.

8. Thomas Aquinas, *Summa theologiae* I-II, Q. 13 a. 5 ad 1.

9. *Ibid.* II-II, Q. 88 a. 2 (vow to do the impossible not binding); Q. 89, a. 7 (oath to do the impossible not binding).

10. Cajetan (Tomasso di Vio), *Commentaria to Thomas Aquinas, Summa theologiae* (1698), to II-II, Q. 113, a. 1; Domenicus Soto, *De iustitia et iure libri decem* (1551), lib. 8, q. 2, a. 1; Ludovicus Molina, *De iustitia et iure tractatus* (1614), disp. 271. no. 1; Leonardus Lessius, *De iustitia et iure, ceterisque virtutibus cardinalis libri quatuor* (1628), lib. 2, cap. 10, dub. 10 no. 70.

explained how to reconcile this maxim with the Roman rules. The confusion lasted throughout the natural law era. Pufendorf claimed that the seller was never liable for failing to do the impossible but, if he were at fault in making the promise, the buyer could recover any loss suffered.<sup>11</sup> He had achieved consistency but only by sacrificing the Roman texts.

The nineteenth-century jurists thus inherited a body of law in disarray. The principled explanations of the natural lawyers did not seem to explain the Roman law, which was very hard to explain in any case. As we will see, they borrowed their rules from Roman law, but borrowed selectively.

### Common Law

#### **Taylor v. Caldwell, (1863) 3 Best & S. 826 (Q.B.)**

Blackburn, J. "In this case the plaintiffs and defendants had, on May 27th, 1861, entered into a contract by which the defendants agreed to let the plaintiffs have the use of The Surrey Gardens and Music Hall on four days then to come, viz., June 17th, July 15th, August 5th, and August 19th, for the purpose of giving a series of four grand concerts, and day and night fêtes, at the Gardens and Hall on those days respectively; and the plaintiffs agreed to take the Gardens and Hall on those days, and pay £100 for each day . . .

After the making of the agreement, and before the first day on which a concert was to be given, the Hall was destroyed by fire. This destruction, we must take it on the evidence, was without the fault of either party, and was so complete that in consequence the concerts could not be given as intended. And the question we have to decide is whether, under these circumstances, the loss which the plaintiffs have sustained is to fall upon the defendants . . .

There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible. The law is so laid down in 1 Roll.Abr. 450, Condition (G), and in the note (2) to *Walton v. Waterhouse* (2 Wms.Saund. 421a, 6th Ed.). And is recognized as the general rule by all the judges in the much discussed case of *Hall v. Wright* (E.B. & E. 746). But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such

11. Samuel Pufendorf, *De iure naturae et gentium libri octo* (1688), III.vii.2–3.



continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfill the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition . . .

There is a class of contracts in which a person binds himself to do something which requires to be performed by him in person; and such promises, e.g. promises to marry, or promises to serve for a certain time, are never in practice qualified by an express exception of the death of the party; and therefore in such cases the contract is in terms broken if the promisor dies before fulfilment. Yet it was very early determined that, if the performance is personal, the executors are not liable; *Hyde v. The Dean of Windsor* (Cro.Eliz. 552, 553). See 2 Wms. Exors. 1560 (5th Ed.), where a very apt illustration is given. 'Thus,' says the learned author, 'if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract; for the undertaking is merely personal in its nature, and by the intervention of the contractor's death, has become impossible to be performed.' For this he cites a dictum of Lord Lyndhurst in *Marshall v. Broadhurst* (1 Tyr. 348, 349) and a case mentioned by Patteson, J., in *Wentworth v. Cock* (10 A. & E. 42, 45–46). In *Hall v. Wright* (E.B. & E. 746, 749), Crompton, J., in his judgment, puts another case. 'Where a contract depends upon personal skill, and the act of God renders it impossible, as, for instance, in the case of a painter employed to paint a picture who is struck blind, it may be that the performance might be excused.' . . .

These are instances where the implied condition is of the life of a human being, but there are others in which the same implication is made as to the continued existence of a thing. For example, where a contract of sale is made amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day; there, if the chattels, without the fault of the vendor, perish in the interval, the purchaser must pay the price, and the vendor is excused from performing his contract to deliver, which has thus become impossible . . .

We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the Hall and Gardens and other things. Consequently the rule must be absolute to enter the verdict for the defendants."

**Note on *Taylor v. Caldwell*.** It is hard to speak of a common law rule before the nineteenth century. Sometimes, English courts excused a party who could not perform. They did so, for example, when the performance was illegal,<sup>1</sup> or the party obligated to perform had died,<sup>2</sup> or the object bailed had been destroyed by an “act of God,”<sup>3</sup> or a plague suspended construction work.<sup>4</sup> On the other hand, in the case of *Paradine v. Jane*,<sup>5</sup> a lessee was not excused from paying rent when soldiers in the English Civil War made it impossible for him to occupy the property.

Blackburn seems to have been drawing on two different lines of continental authority. One is the doctrine of changed circumstances which we will meet later on. For centuries, continental lawyers had said that every contract is subject to an implied condition that “matters remain in their present state,” the so-called *clausula rebus sic stantibus*. As we will see, that doctrine can excuse a party even when performance has not become impossible.

As Samuel Williston, Max Rheinstein, and others have noted, Blackburn was also drawing on a Roman rule about impossibility.<sup>6</sup> A contract was void if it was impossible to perform although, again, the defendant could not escape liability by simply proving the performance was impossible for him personally. He had to show that the performance was beyond the power of people generally.<sup>7</sup> Blackburn not only borrowed this rule but extended it. As we saw, the Romans distinguished between whether performance was impossible initially or whether it became so subsequently. In the latter case, liability depended on whether the party who failed to perform was at “fault” but they did not mean fault in the ordinary sense of the term. They meant a party was liable unless he could prove *vis maior*. Here, although Blackburn was borrowing from Roman law, he did not distinguish between initial and subsequent impossibility nor of did he speak of *vis maior*.

## French Law

### French Civil Code

#### ARTICLE 1218

In contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor. If the prevention is temporary, performance of the obligation is suspended unless the delay which results justifies termination of the contract. If the prevention is permanent, the contract is terminated by

1. *Abbott of Westminster v. Clerke*, 1 Dy. 26b, 28b, 73 Eng. Rep. 59, 63 (K.B. 1536).

2. *Hyde v. Dean of Windsor*, Cro. Eliz. 552, 78 Eng. Rep. 798 (K.B. 1597).

3. *Williams v. Hide*, Palm. 548 (1624).

4. H. Rolle, Abridgment 450, Cond. (G), p. 10 (London 1668).

5. Aley 26, 82 Eng. Rep. 897 (K.B. 1647).

6. Samuel Williston, *The Law of Contracts* (1920), § 1931; Max Rheinstein, *Die Struktur des vertraglichen Schuldverhältnisses im anglo-amerikanischen Recht* (1932), 175.

7. Dig. 45.1.137.

operation of law and the parties are discharged from their obligations under the conditions provided by articles 1351 and 1351–1.

#### ARTICLE 1351

The impossibility of making a performance frees the debtor from doing so when it results from an occasion of force majeure and when it is final, at least when he has not agreed to be responsible . . .

**Note.** As these articles indicate, unlike Roman law, the French Civil Code does not distinguish between situations in which performance is excused by impossibility and those in which it is excused by *force majeure*.

In the nineteenth century, French jurists, like French jurists today, explained that to constitute *force majeure*, an event must be irresistible: tempest, earthquake, war, and so forth.<sup>1</sup> Nevertheless, they either stated or implied that absent *force majeure*, a party who fails to perform is not at fault.<sup>2</sup> If that were so, a party would be liable only if he intentionally or negligently breached the contract. A French jurist today would explain liability for breach of contract more clearly by using a distinction first developed by René Demogue.<sup>3</sup> He said that some contracts entail a duty to use best efforts (*obligation de moyens*) and others entail a duty actually to achieve a specific result (*obligation de résultat*). In the former case a party is liable only if he is at fault. In the latter case he is liable unless he can prove *force majeure*.

### German Law

Until 2002, the German Civil Code followed Roman law by distinguishing initial from subsequent liability. The Code was then amended so that it did not matter when the impossibility occurred. Retained from the past, however was the principle that liability for an impossible performance depended on whether a party was responsible for the fact that performance became impossible. According to § 276 of the Code, he was “responsible” only for “willful default and negligence.”

The drafters had meant what they said. If a performance was impossible, and it was not the fault of the person who was supposed to perform, why should he be held liable? For several hundred years, many jurists had been insisting that a party who did not perform a contract should only be liable for fault in the ordinary sense. The late scholastics<sup>1</sup> and the natural

1. Charles Aubry and Charles Rau, *Cours de droit civil français* 4 (4th edn., Paris 1869–71), § 308; Charles Demolombe, *Cours de Code Napoléon* 24 (Paris 1854–82), 549–52; François Laurent, *Principes de droit civil français* 16 (3rd edn., Paris 1869–78), § § 256–7; Leobon Larombière, *Théorie et pratique des obligations* 1 (Paris, 1857), 541–2.

2. See Aubry and Rau, *Cours*, 4, § 308; Laurent, *Principes*, 16, § 256; Larombière, *Théorie et pratique*, 1, 541–2. Demolombe did observe that sometimes a party might

not be at fault even though no such event had occurred, but he simply noted that the security of transactions requires that the party be held liable. Demolombe, *Cours*, 24, § 550.

3. René Demogue, *Traité des obligations en général* 5 (1921–33), § 1237.

1. Ludovicus Molina, *De iustitia et iure libri decem* (1614), disp. 293 no. 23; Leonardus Lessius, *De iustitia et iure, ceterisque virtutibus cardinalis* (1628), lib. 2 cap. 7 dubs. 6–8.

lawyers<sup>2</sup> did not understand strict liability in contract for much the same reason that they did not understand it in tort. Neither did the nineteenth-century German jurists.<sup>3</sup> If a party had behaved like a reasonable person should, any event that made performance impossible for him was an accident. As Puchta said, liability that went beyond fault was liability for chance.<sup>4</sup> What could be the point of distinguishing between an accident and an utter accident? The drafters of the German Civil Code agreed although they made an exception when “what is owed is designated only by species.”

But even before the reforms of 2002, the German courts were unable to live with that position. As a result, cases in Germany come out in much the same way as in France, England, and the United States.<sup>5</sup> In some contracts, a party can escape liability if he was not at fault. But in others – the sort that the French would call contracts to achieve a particular result – he is liable even if he was not at fault if the performance became impossible because of an event that is normally within a person’s control: if he failed to perform because he lacked the financial resources to do so,<sup>6</sup> or materials were delivered to him late,<sup>7</sup> or his suppliers failed him.<sup>8</sup> Moreover, the event that prevents performance must be one that the parties would not foresee or take into account at the time the contract was formed.<sup>9</sup>

And so, by implication, this idea of when a party was excused was accepted by the drafters of the 2002 reforms.

2. Hugo Grotius, *De iure belli ac pacis libri tres* (1646), II.xvii.1; Samuel Pufendorf, *De iure naturae et gentium libri octo* (1688), III.i.2, III.i.6; Jean Barbeyrac, *Le droit de la nature et des gens ... par le baron de Pufendorf, traduit du latin* (5th edn., 1734), n. 1 to III.i.2, n. 4 to III.i.6. See generally, Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990), 692–3, 1032–4. The natural lawyers generally applied the same principles to liability in both contract and tort. See Grotius, *De iure belli ac pacis libri tres*, II.xvii.1–2; Pufendorf, *De iure naturae et gentium libri octo*, III.i.2–3; Barbeyrac, *Le droit de la nature*, n. 1 to III.i.3.

3. Karl Ludwig Arndts, *Lehrbuch der Pandekten* (14th edn., 1889), § 86 n. 3; Aloys Brinz and Philipp Lotmar, *Lehrbuch der Pandekten* 2 (2nd edn., 1892), § 267 n. 26; Georg Friedrich Puchta, *Pandekten* (2nd edn., 1844), § 266; Bernhard Windscheid, *Lehrbuch des Pandektenrechts* 1 (7th edn., 1891), § 101; Karl Vangerow, *Leitfaden für Pandekten Vorlesungen* 1 (1847), § 107.

4. Puchta, *Pandekten*, § 266. Similarly, see Windscheid, *Lehrbuch*, 1: § 101.

5. Manfred Löwisch in Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch* (13th edn., 1994) no. 11 to § 282; Peter Schlechtriem, “Rechtsvereinheitlichung in Europa und Schuldrechtsreform in Deutschland,” *Zeitschrift für Europäisches Privatrecht* 1 (1993), 228–9.

6. Emmerich in *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (3rd edn., 1995), no. 3 to § 285; Löwisch in Staudinger, *Kommentar*, no. 12 to § 285; Frank Peters in Staudinger, *Kommentar*, no. 13 to § 635.

7. Battes in Erman, *Handkommentar zum Bürgerlichen Gesetzbuch* (9th edn., 1993), no. 2 to § 285.

8. Emmerich in *Münchener Kommentar*, no. 3 to § 285.

9. Emmerich *Münchener Kommentar*, no. 3 to § 285; Peters in Staudinger, *Kommentar*, no. 10 to § 635; Herbert Wiedemann, in Soergel, *Kommentar zum Bürgerlichen Gesetzbuch* (12th edn., 1990), no. 6 to § 285.

## Chinese Law

### Chinese Civil Code

#### ARTICLE 180

If a civil obligation cannot be performed due to force majeure, the non-performing party is exempted from civil liability except in situations provided for by law.

Force majeure means objective circumstances that are unforeseeable, unavoidable and insurmountable.

#### **Baijia Real Estate Consulting LLC v. Chen Jinjin**, 珠海百佳房地产投资顾问有限公司、陈金金居间合同 (2017)粤04民终2875号 (2017) Yue 04 Min Zhong No.2875

Baijia LLC, the realtor, sued Chen, the buyer of an apartment, for the service fees in the amount of RMB 52,000 yuan incurred in servicing the transaction when the defendant decided not to go through with it.

The defendant intended to purchase the apartment 401 and handed over a deposit to the seller, Liu, via Baijia LLC in the amount of RMB 20,000 yuan on October 4, 2016. The sales agreement was concluded on the same day. On October 6, the municipal government issued housing regulations that, in some regard, limit certain people's eligibility to purchase a second house that is under the size of 144 square meters. One of the restrictions applies to people who do not hold a household registration in Zhuhai. The defendant holds her household registration in Shenzhen and has owned one house. Given the fact that the apartment was under 144 square meters in area, the defendant became ineligible and refused to make an effort to go through with the transaction and try her luck registering with the housing authority.

The service fee in the contract was already paid in full by both buyer and seller when the agreement was entered. There is a penalty clause in the agreement that stipulates the loss suffered by the agent to RMB 52,000 yuan for breach of contract by either party after the signing. The realtor argued that Chen did not go through with the contract because she speculated that the market price was going to fall after the regulations. She should at least make the effort to close the deal and register with the housing authority.

The trial court held that Chen was excused from performing the contract because of the policy change, which is a change of circumstances. Chen, as a result, is not liable for breach of contract. The appellate court held that there was no evidence supporting the additional service fee incurred. The court further held that "[t]he government policy change bars defendant from purchasing the apartment and is an objective circumstance that is unforeseeable and insurmountable."

### **The Draft Common Frame of Reference**

#### **ARTICLE II. 7:102 INITIAL IMPOSSIBILITY OR LACK OF RIGHT OR AUTHORITY TO DISPOSE**

A contract is not invalid, in whole or in part, merely because at the time it is concluded performance of any obligation assumed is impossible, or because a party has no right or authority to dispose of any assets to which the contract relates.

#### **ARTICLE III. 3:104 EXCUSE DUE TO AN IMPEDIMENT**

- (1). A debtor's non-performance of an obligation is excused if it is due to an impediment beyond the debtor's control and if the debtor could not reasonably be expected to have avoided or overcome the impediment or its consequences.
- (2). Where the obligation arose out of a contract or other juridical act, nonperformance is not excused if the debtor could reasonably be expected to have taken the impediment into account at the time when the obligation was incurred.
- (3). Where the excusing impediment is only temporary the excuse has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the creditor may treat it as such.
- (4). Where the excusing impediment is permanent the obligation is extinguished.

### **The Unidroit Principles of International Commercial Contracts**

#### **ARTICLE 3.3 INITIAL IMPOSSIBILITY**

- (1). The mere fact that at the time of the conclusion of the contract the performance of the obligation assumed was impossible does not affect the validity of the contract.
- (2). The mere fact that at the time of the conclusion of the contract a party was not entitled to dispose of the assets to which the contract relates does not affect the validity of the contract.

#### **ARTICLE 5.4 DUTY TO ACHIEVE A SPECIFIC RESULT; DUTY OF BEST EFFORTS**

- (1). To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.
- (2). To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances.



## ARTICLE 5.5 DETERMINATION OF THE KIND OF DUTY INVOLVED

In determining the extent to which an obligation of a party involves a duty of best efforts in the performance of an activity or a duty to achieve a specific result, regard shall be had, among other factors, to

- (a). the way in which the obligation is expressed in the contract;
- (b). the contractual price and other terms of the contract;
- (c). the degree of risk normally involved in achieving the expected result;
- (d). the ability of the other party to influence the performance of the obligation.

## ARTICLE 7.1.7 FORCE MAJEURE

- (1). Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
- (2). When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.

## 2. Changed Circumstances

### a. Origins

The Romans did not have a doctrine of changed circumstances. This doctrine was an invention of the medieval Canon lawyers. Gratian's *Decretum* contained a passage in which St. Augustine, following Cicero, said that one need not keep a promise to return a sword to a person who has become insane.<sup>1</sup> A gloss to the *Decretum* explained that "this condition is always understood: if matters remain in the same state."<sup>2</sup> Baldus then read the doctrine into civil law. All promises were subject to such a condition.<sup>3</sup>

The canon lawyers did not have a theoretical explanation for the doctrine. It just seemed reasonable to them. An explanation was proposed by Thomas Aquinas on the basis of an idea he took from Aristotle and was eventually adopted by the late scholastics in the sixteenth century.

The idea was Aristotle's theory of "equity." According to Aristotle, since laws are made to serve purposes, circumstances can always arise in which obeying the law will no longer serve the purpose for which it was made. Under these circumstances, the law maker would not want it to be obeyed. Therefore, as a matter of "equity" it should not be obeyed. Aquinas said that a promise is

1. Gratian, *Decretum* C. 22, q. 2, c. 14.

2. *Glossa ordinaria* to Gratian, *Decretum* to "furens" to C. 22, q. 2, c. 14.

3. Baldus de Ubaldis, *Commentaria Corpus Iuris Civilis* (1577), to Dig. 12.4.8.



like a law that a person makes for himself. Therefore, like a law, a promise is not binding in circumstances where the promisor would not have intended to be bound.<sup>4</sup> Aquinas' explanation was adopted by late scholastics such as Lessius.<sup>5</sup> Again, the principle was preserved by the northern natural lawyers of the seventeenth and eighteenth century. The promisor is not bound if the change of circumstances concerns the "unique reason" or "unique cause" for his promise<sup>6</sup> or the "presumption of some fact" on which his consent was conditioned.<sup>7</sup> Grotius used this doctrine to explain relief for mistake as well.<sup>8</sup>

Again, with the rise of the will theories of contract in the nineteenth century, this doctrine went into eclipse. To most jurists, enforcing the will of the parties meant enforcing what the parties had consciously and expressly willed. Nevertheless, a few defenders of the doctrine explained relief by saying the existence of certain circumstances was a tacit or implied condition of the contract. According to the French jurist Larombière, an "error in motive" affected the validity of a contract only if the parties so wished, but a judge would determine whether they so wished by examining "according to the circumstances, if the fact alleged as a motive was taken to be the determining reason (*raison déterminante*) and if the consent depended on its reality."<sup>9</sup> The German jurist Windscheid said that the continuation of certain circumstances could be an "undeveloped condition" of the contract, "undeveloped" in the sense that it was not expressly willed by the parties.

The doctrine forced itself on the attention of Anglo-American jurists when the Coronation Cases were decided in the early twentieth century. Rooms had been rented along the route of the coronation procession of Edward VII for a single day and at a suitably enhanced price. When Edward became ill, the procession was postponed. In *Krell v. Henry*, relief was granted on the grounds, again, that an implied condition of the contract had not been fulfilled.<sup>10</sup> Anglo-American jurists repeated this explanation.

For most nineteenth-century jurists, the obvious objection to the doctrine was that a tacit or undeveloped condition was one that the parties never consciously willed. They had never thought about the change in circumstances, let alone agreed on what should happen if the change occurred. The judge said the contract was subject to such a condition in order to obtain what he thought was a sensible and fair result. As Williston said, "any qualification of the promise is based on the unfairness or unreasonableness of giving it the absolute force which its words clearly state."<sup>11</sup>

4. Thomas Aquinas, *Summa theologiae* II-II, Q. 88, a. 10; Q. 89, a. 9.

5. Lessius, *De iustitia et iure*, lib. 2, cap. 17, dub. 10; cap. 18, dub. 10.

6. Grotius, *De iure belli ac pacis*, II. xvi.25.2; Barbeyrac, *Le droit de la nature*, to n. 3 to III.vi.6; Christian Wolff, *Ius naturae methodo scientifica pertractatum* 3 (1764), § 504.

7. Pufendorf, *De iure naturae ac gentium*, III.vi.6.

8. Grotius, *De iure belli ac pacis*, II.xi.6.

9. Leobon Larombière, *Théorie et pratique des obligations* 1 (1857), 282–3.

10. [1903] 2 K.B. 740.

11. Samuel Williston, *The Law of Contracts* (1920), § 1937. Instead of speaking of implied conditions, Williston said that relief was given because of a "presumed assumption by the parties of some vital supposed fact." He acknowledged that "[t]he only evidence ... of such mutual

French courts in the nineteenth century refused to give relief for change of circumstances, and, except in administrative courts where claims are brought against the government, they still refuse to do so. The drafters of the German Civil Code did not include such a doctrine. And yet, as we will see, in Germany and the United States, the doctrine of changed circumstances, like relief for unfairness, has seen a renaissance.

## b. Modern Law

### English Law

#### **Krell v. Henry, [1903] 2 K.B. 740**

“The plaintiff, Paul Krell, sued the defendant, C.S. Henry, for £ 50, being the balance of a sum of £ 75, for which the defendant had agreed to hire a flat at 56A, Pall Mall on the days of June 26 and 27, for the purpose of viewing the processions to be held in connection with the coronation of His Majesty [King Edward VII]. The defendant denied his liability, and counterclaimed for the return of the sum of £ 25, which had been paid as a deposit, on the ground that, the processions not having taken place owing to the serious illness of the King, there had been a total failure of consideration for the contract entered into by him.”

Vaughn Williams, L.J. “The real question in this case is the extent of the application in English law of the principle of the Roman law which has been adopted and acted on in many English decisions, and notably in the case of *Taylor v. Caldwell* . . . I do not think that the principle of the civil law as introduced into the English law is limited to cases in which the event causing the impossibility of performance is the destruction or nonexistence of some thing which is the subject matter of the contract, or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such a case, if the contract becomes impossible of performance by reason of the nonexistence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited . . .

In my judgment the use of the rooms was let and taken for the purpose of seeing the Royal procession . . . And in my judgment the taking place of those processions along the proclaimed route, which passed 56A, Pall Mall, was regarded by both contracting parties as the foundation of the contract . . .”

assumption is, generally, that the court thinks a reasonable person, that is, the court itself, would not have contemplated taking the risk of the existence of the fact in

question.” *Ibid.* Thus although Williston did not talk about “implied conditions,” he asked the same question: what was sensible for the parties to have done.

**Tsakiroglou & Co., Ltd. v. Noble & Thorl G.m.b.h., [1962] A.C. 93 (H.L.)**

“By a contract dated Oct. 4, 1956, the appellants agreed to sell to the respondents three hundred tons of Sudanese groundnuts c.i.f. Hamburg, shipment during November/December, 1956 ... [A]t the date of the contract, the usual and normal route for the shipment of Sudanese groundnuts from Port Sudan to Hamburg was via the Suez Canal. Sufficient groundnuts were held at Port Sudan to the appellants’ order to fulfil the contract, and space was booked on ships for them. Following the military operations against Egypt by British and French armed forces, the Suez Canal was blocked to shipping on Nov. 2, 1956, and it remained blocked until April, 1957, but the appellants could have transported the groundnuts via the Cape of Good Hope during November/December, 1956. The appellants did not ship any groundnuts ...”

Lord Reid. “My Lords, the appellants agreed to sell to the respondents three hundred tons of Sudan groundnuts at £ 50 per ton c.i.f. Hamburg. Admittedly the groundnuts had to be shipped from Port Sudan. The usual and normal route at the date of the contract was via Suez Canal. Shipment was to be November/December, 1956, but, on Nov. 2, 1956, the canal was closed to traffic and it was not reopened until the following April ... The freight via Suez would have been about £7 10s. per ton. The freight via the Cape was increased by stages. It was £15 per ton after Dec. 13. I shall assume in favour of the appellants that the proper comparison is between £7 10s. and £15 per ton ... The question now is whether, by reason of the closing of the Suez route, the contract had been ended by frustration ...

There might be cases where damage to the goods was a likely result of the longer voyage which twice crossed the Equator, or, perhaps, the buyer could be prejudiced by the fact that the normal duration of the voyage via Suez was about three weeks, whereas the normal duration via the Cape was about seven weeks. But there is no suggestion in the case that the longer voyage could damage the groundnuts or that the delay could have caused loss to these buyers of which they could complain. Counsel for the appellants rightly did not argue that this increase in the freight payable by the appellants was sufficient to frustrate the contract, and I need not, therefore, consider what the result might be if the increase had reached an astronomical figure. The route by the Cape was certainly practicable. There could be, on the findings in the case, no objection to it by the buyers, and the only objection to it from the point of view of the sellers was that it cost them more. And it was not excluded by the contract. Where, then, is there any basis for frustration? It appears to me that the only possible way of reaching a conclusion that this contract was frustrated would be to concentrate on the altered nature of the voyage. I have no means of judging whether, looking at the matter from the point of view of a ship whose route from Port Sudan was altered from via Suez to via the Cape, the difference would be so radical as to involve frustration, and I express no opinion about that. As I understood the argument, it was based on the assumption that the voyage was the manner of performing the sellers’ obligations and that,

therefore, its nature was material. I do not think so. What the sellers had to do was simply to find a ship proceeding by what was a practicable and now a reasonable route – if, perhaps, not yet a usual route – to pay the freight and obtain a proper bill of lading, and to furnish the necessary documents to the buyer. That was their manner of performing their obligations, and, for the reasons which I have given, I think that such changes in these matters as were made necessary fell far short of justifying a finding of frustration.”

Lord Hodson. “Nothing was proved or found as to the nature of the goods or other circumstances which would render the route round the Cape unreasonable or impracticable, and this route was at all times available. Unless shipment by the Cape route was so onerous to the sellers as to make the performance of the contract fundamentally different in kind from any performance they had promised, the contract of Oct. 4, 1956, remained binding between the parties.”

Viscount Simonds. “[T]he seller may be put to greater cost; his profit may be reduced or even disappear. But it hardly needs reasserting that an increase of expense is not a ground of frustration . . . .”

### **Law in the United States**

#### **Mineral Park Land Co. v. Howard, 172 Cal., 289, 156 P. 458 (1916)**

Defendants made a contract with public authorities to build a concrete bridge across a ravine on land owned by the plaintiff. They made a contract with the plaintiff in which he granted them the right to haul gravel and earth from his land, and the defendants agreed to take from the land all the gravel and earth necessary for the fill and cement work on the bridge. Defendants used 101,000 cubic yards for this work but obtained 50,869 cubic yards from persons other than plaintiff. The trial court found that the plaintiff's land contained over 101,000 cubic yards of earth and gravel but that only the 50,131 cubic yards taken by defendants were above water. To take more, the defendants would have to have used a steam dredger, and the earth and gravel taken could not have been used before drying it. According to the trial court, the defendants took all the earth and gravel from plaintiff's land “that was practical to take and remove from a financial standpoint.” To take more would have cost ten or twelve times the usual cost per yard which would have been possible but not “advantageous or practical.” The trial court held that the defendant was excused. In affirming the decision, the California Supreme Court said:

When [the parties] stipulated that all of the earth and gravel needed for this purpose should be taken from plaintiff's land, they contemplated and assumed that the land contained the requisite quantity, available for use. The defendants were not binding themselves to take what was not there. And, in determining whether the earth and gravel were “available,” we must view the conditions in a practical and reasonable way. Although there was gravel on the land, it was so situated that the defendants could not take it by ordinary means, not except at

a prohibitive cost. To all fair intents then, it was impossible for defendants to take it . . .

A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost. 1 Beach on Cont. § 216. We do not mean to intimate that the defendants could excuse themselves by showing the existence of conditions which would make the performance of their obligation more expensive than they had anticipated, or which would entail a loss upon them. But, where the difference in cost is so great as here, and has the effect, as found, of making performance impracticable, the situation is not different from that of a total absence of earth and gravel.

**Transatlantic Financing Corp. v. United States, 363 F.2D 312 (D.C. Cir. 1966)**

On October 2, 1956, Transatlantic Financing Corp. contracted with the United States to carry a full cargo of wheat from a United States Gulf port to a port in Iran. On July 26, the government of Egypt had nationalized the Suez Canal. On October 27, the ship operated by Transatlantic Financing left Galveston on a course that would have taken her through Gibraltar and the Suez Canal. Israel invaded Egypt on October 29, Britain and France did so on October 31. On November 2, the Egyptian government closed the canal. On or about November 7, a Transatlantic employee asked an employee of the United States to agree to additional compensation for a voyage around the Cape of Good Hope. This request was refused. The ship changed course and reached Iran by sailing around the Cape.

Skelly Wright, J. "When the issue [of impossibility] is raised, the court is asked to construct a condition of performance based on the changed circumstances, a process which involves at least three reasonably definable steps. First, a contingency – something unexpected – must have occurred. Second, the risk of the unexpected occurrence must not have been allocated either by agreement or by custom. Finally, occurrence of the contingency must have rendered performance commercially impracticable. Unless the court finds these three requirements satisfied, the plea of impossibility must fail.

The first requirement was met here. It seems reasonable, where no route is mentioned in a contract, to assume the parties expected performance by the usual and customary route at the time of contract . . .

Proof that the risk of a contingency's occurrence has been allocated may be expressed in or implied from the agreement . . . If anything, the circumstances surrounding this contract indicate that the risk of the Canal's closure may be deemed to have been allocated to Transatlantic. We know or may safely assume that the parties were aware, as were most commercial men with interests affected by the Suez situation [citation omitted], that the Canal might become a dangerous area. No doubt the tension affected freight rates, and it is arguable that the risk of closure became part of the dickered terms. Uniform Commercial Code § 2-615,

comment 8. We do not deem the risk of closure so allocated, however. Foreseeability or even recognition of a risk does not necessarily prove its allocation. Compare Uniform Commercial Code § 2-615, Comment 1; Restatement, Contracts § 457 (1932). Parties to a contract are not always able to provide for all the possibilities of which they are aware, sometimes because they cannot agree, often simply because they are too busy. Moreover, that some abnormal risk was contemplated is probative but does not necessarily establish an allocation of the risk of the contingency which actually occurs. In this case, for example, nationalization by Egypt of the Canal Corporation and formation of the Suez Users Group did not necessarily indicate that the Canal would be blocked even if a confrontation resulted. The surrounding circumstances do indicate, however, a willingness by Transatlantic to assume abnormal risks, and this fact should legitimately cause us to judge the impracticability of performance by an alternative route in stricter terms than we would were the contingency unforeseen.

We turn then to the question whether occurrence of the contingency rendered performance commercially impracticable under the circumstances of this case. The goods shipped were not subject to harm from the longer, less temperate Southern route. The vessel and crew were fit to proceed around the Cape. Transatlantic was no less able than the United States to purchase insurance to cover the contingency's occurrence. If anything, it is more reasonable to expect owner-operators of vessels to insure against the hazards of war. They are in the best position to calculate the cost of performance by alternative routes (and therefore to estimate the amount of insurance required), and are undoubtedly sensitive to international troubles which uniquely affect the demand for and cost of their services. The only factor operating here in appellant's favor is the added expense, allegedly \$43,972.00 above and beyond the contract price of \$305,842.92, of extending a 10,000 mile voyage by approximately 3,000 miles. While it may be an overstatement to say that increased cost and difficulty of performance never constitute impracticability, to justify relief there must be more of a variation between expected cost and the cost of performing by an available alternative than is present in this case, where the promisor can legitimately be presumed to have accepted some degree of abnormal risk, and where impracticability is urged on the basis of added expense alone."

## **French Law**

### **French Civil Code**

#### ARTICLE 1195

If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to perform his obligations during renegotiation. In the



case of refusal or the failure of renegotiations, the parties may agree to terminate the contract from the date and on the conditions which they determine, or by a common agreement ask the court to set about its adaptation. In the absence of an agreement within a reasonable time, the court may, on the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall determine.

**Note.** This provision was added to the Code by Ordonnance no. 2016–131 of February 10, 2016. Previously, French courts had refused to give relief for changed circumstances even in extreme cases.

## German Law

### German Civil Code

#### § 242 PERFORMANCE IN GOOD FAITH

The party owing a performance is bound to perform in the way which is required by good faith (*Treu und Glauben*) having regard to the ordinary usage.

**Note.** The following provision was enacted in 2002 to amend the German Civil Code codifying, as we will see, a doctrine the courts had already developed by applying § 242.

#### § 313 DESTRUCTION OF THE BASIS OF THE TRANSACTION (*GESCHÄFTSGRUNDLAGE*)

- (1). If circumstances that formed the basis of the transaction have seriously changed thereafter and the parties would not have entered into the contract or one with the same content had they foreseen the change, then the adaptation of the contract can be required insofar as for one of the parties, taking into account all of the circumstances of the particular case, and especially the division or risks provided for by the contract or by statute, adherence to the contract no longer can be expected.
- (2). It is equivalent to a change of circumstances when essential conceptions which formed the basis of the contract have proven false.
- (3). If an adaptation of the contract is not possible or unreasonable in part, then the disadvantaged party can withdraw from the contract ...

### Reichsgericht, 21 September 1920, RGZ 100, 129

“In 1912, the plaintiff rented the defendant business space in its Berlin property for a period ending on April 1, 1915. The contract continued to run until the end of March, 1920 because the defendant availed itself of the right [contained in the lease] to renew for five years. Under article 20 of the contract, the defendant could require that steam be furnished for industrial purposes. The plaintiff considers that it is justified, because of the basically changed conditions since the time when the contract was concluded, in demanding additional compensation, besides the compensation



paid under article 20, for the steam provided between September 1, 1917, through the end of July, 1919. The plaintiff also seeks to establish either that the contract for the delivery of steam was invalid or that in the future there was no obligation to deliver steam unless a reasonable price was paid. Both the *Landgericht* and the court of appeal gave judgment for the defendant, but the plaintiff's appeal [*Revision*] has been successful . . .

The court of appeal properly refused to accept the plaintiff's argument, according to which, under a proper interpretation, article 20, number 6, of the contract . . . 'the price for industrial steam is determined as follows,' as well as other contractual language, requires a change in the price of steam when a fundamental change in conditions occurs. The discussion of the court of appeal on this point is basically directed to factual matters and does not reveal any error as to the law. Nor can any objections be raised to the discussion of the court of appeal in which it rejected the attempt of the plaintiff to find a basis for its claim by seeing in the defendant's hard-headed insistence upon the contract price a violation of good morals under § 138 of the Civil Code, from which would follow, according to the plaintiff's further argument, the present invalidity of the contractual stipulations as to the price of steam so that the possibility of establishing a fair price for steam under the provisions of § 632 or § 812 of the Civil Code would be open.

However, the request of the plaintiff appears to be justified from the point of view of the so-called *clausula rebus sic stantibus*.

The Civil Code recognizes this principle only as applied to a few special cases and, as this Senate said recently in a decision of July 8, 1920, RGZ 99, 259, the *Reichsgericht* has not recognized this as a general principle.

However, the *Reichsgericht* has recognized, in a series of decisions of this and other Senates in the last few years, in exceptional cases, the effect upon existing contracts of the collapse of, and changes in, all economic relations brought about by the unexpected course and conclusion of the war. The court has held the request of one party for the dissolution of a contractual relationship to be justified when it could no longer be expected, from the economic point of view, that the party to the contract carry it out under the new, completely changed conditions. This rule found and finds support in the positive written law in §§ 242 (157) and 325 of the Civil Code. If, under the first of these provisions, good faith (*Treu und Glauben*) regulates the debtor's duty to perform as well as the creditor's right of performance – his right to the performance – then, under this provision, the performance of a contract can no longer be owed or demanded when, as a result of a complete change in conditions, the performance has become completely different from the performance originally contemplated and desired by both parties. And if, in § 325 of the Civil Code, under impossibility not only factual but also economic impossibility is to be understood, the *clausula rebus sic stantibus* is, to this extent, clearly contained in the code.

In the cases decided earlier, the situation was such that one party to the contract demanded a complete dissolution of the contractual bond on the ground of completely changed conditions. In the present case both

parties desire to continue the contract or have continued it. One of them, here the plaintiff, demands in connection with the continuation of the contract an increase in the contract price. This demand is based upon the assertion that its own performance, as a result of the complete change in all the important relationships, has, economically speaking, become so entirely different from that created upon the conclusion of the contract, that, if the other performance is not changed, there would be a completely unsupportable disproportion, economically speaking, between the two performances, so that good faith requires that the other performance be changed. It is now the Senate's conviction that the [previous] declaration of this Senate [that contractual relations could not be modified to relieve the hardships of war] can no longer be supported as a strict, general proposition. The statement has become outmoded due to the experience that the Senate has had during the subsequent course of war and especially due to the unexpected outcome of the war and the subsequent, and also unexpected, overturning of all economic relations. These conditions clearly require an interference by the judge with existing contractual relations if an unbearable condition in which good faith and every requirement of justice and fairness are ignored is not to be created. But in order to prevent from the very beginning every misuse of this principle three things must be required for its application:

First, as has already been repeatedly noted, both parties must desire the continuation of the contract. The case of compulsory continuation cannot be considered here. Second, only very special and very exceptional changes in circumstances, such as have now been brought about by the war, can bring about the result described. The mere circumstance that a later change in conditions was not foreseen and could not have been foreseen does not suffice. Third, in a case of this sort an adjustment of the interests on each side must take place. A change cannot take place only in favor of the person who suffers under the new conditions because of the continuation of the contract, but one must also consider the interests of the other party who in the future must give more or something else in performing. The whole disadvantage cannot be placed on him, so that the condition now becomes unsupportable for him and fairness and justice are not observed. Instead the damages must be fairly apportioned between both parties. Proper finding of this adjustment depends upon the experience of the judge and his understanding judgment of the reciprocal relations. If one considers the instant case from this point of view the decision below is at least supportable. The plaintiff showed that because of the enormous increase in coal and other prices, it had added the amount of 89,000 Reichsmarks to the payment made by the defendant under the contract for the steam delivered in the period between September 1, 1917 and the end of July 1919, and thus had a clear loss in this amount. In this connection it should be noted that the yearly rental for the space rented to the defendant amounted to only 9,362 Reichsmarks. The condition in question will be most clearly seen, however, in the fact that the Rent Office in Berlin raised by more than ten times the contract price for the steam to be delivered by the plaintiff to the defendant in the period from March 31,

1920, the end of the contract, to March 31, 1921, the time to which the Rent Office extended the lease the plaintiff had terminated. In view of this fact and the other clearly apparent relations, the argument of the judge on appeal, that the plaintiff merely miscalculated when the contract was concluded by not considering the consequences of a war, cannot be accepted. Faulty calculations when a contract is concluded do not, of course, constitute a basis for a change in prices that were agreed upon. But even if one wished to agree with the argument of the judge on appeal that the plaintiff should perhaps have taken the consequences of a possible war into consideration, one cannot claim that when the contract was concluded in 1912, the plaintiff should have given any consideration, in view of the situation of the German Reich at that time, to the possibility of such a war with such a size, such an outcome, and such effects, or that it could have taken such a war into consideration. No one in Germany had, or could have had, any notion of such a thing; the events were beyond human prognostication. The judge on appeal thus did a clear wrong to the plaintiff, when, because the plaintiff did not consider the consequences of a possible war, he put the consequences of the present war in the plaintiff's relationship with the defendant upon the plaintiff alone. That the failure to have a war clause in the contract cannot prejudice the plaintiff needs no further explanation . . . .”

**Reichsgericht, 29 November 1921, RGZ 103, 177**

“In October, 1918, the plaintiff bought ten tons of iron wire for immediate delivery from the defendant. When the defendant failed to make delivery, the plaintiff brought . . . an action for damages for nonperformance. The defendant based his defense on changed conditions. A judgment in the court of first instance for the defendant was reversed on appeal and judgment entered for the plaintiff. This decision has been overturned on appeal [*Revision*].

The defendant argues that because of changes that arose since the contract was concluded, it cannot now be expected to perform the contract. The court of appeal had the following to say on this point: ‘The defendant’s position, that the contract was terminated due to subsequent impossibility, is not acceptable. It would be acceptable only if the collapse [of Germany] had brought about a complete change in economic conditions and such a considerable increase in prices that the performance of the contract would entail economic ruin for the defendant.’ This, the court of appeal said, was not claimed. The appeal quite properly challenges this analysis. That analysis shows a position that is too narrow from every point of view. The court of appeal should have considered the question not only from the point of view of impossibility, but, above all, should have determined whether the performance could have been expected in good faith (*Treu und Glauben*) taking into account ordinary usage. The court of appeal’s analysis is also too narrow in that it makes the decision turn upon whether performance would have resulted in economic ruin for the obligee. It was not claimed that this would result, nor, apparently, could it have been claimed. Where

this can be shown it is, of course, quite decisive. But such a showing is not indispensable. For such a requirement clearly does not correspond to the idea that lies behind the *clausula rebus sic stantibus* doctrine and justifies its results. In the first place the requirement of economic ruin leads to a difference in treatment depending upon a party's wealth ... The *clausula rebus sic stantibus* doctrine is rather justified by the reciprocal nature of bilateral contracts of exchange ... In such a contract it must be assumed that the parties concluding the contract intended to enter into a fair contract of exchange, one in which each side is ready to give the other a performance that this latter considers as a full equivalent for his own performance. In general, it is true that each party has to look out for his own interests and that the contract remains effective even though one or both parties are mistaken relative to past or future events. But the case is otherwise if the events so change values, especially the value of money, that the obligee would receive for his performance a counter-performance that no longer comes even near to containing the equivalent that the contract had contemplated. The obligor violates the requirement of good faith when he insists upon the performance under such circumstances."

### **Reichsgericht, 28 November 1923, RGZ 107, 78**

"The plaintiff is the owner of real property entered on the land register of the former German court in Lüderitzbucht [in Africa]. The defendant has been, since 1913, the holder of a mortgage for 13,000 Reichsmarks, which was noted on the land register. The mortgage debt fell due on April 1, 1920. The plaintiff, in payment of the principal obligation and of overdue interest, paid the defendant 18,980 Reichsmarks through a bank. The plaintiff seeks a judgment ordering the defendant to turn over the mortgage papers and to agree to the extinguishing of the mortgage. The defendant refused to do this on the ground that the debt must either be paid in the hard currency of the former German protectorate in Southwest Africa or in money of corresponding value ...

In this case ... it is necessary to answer the question of whether, under German law, the defendant, as mortgage-creditor, can demand a revalorization of the claim secured by the mortgage in view of the heavy inflation in German paper money ...

The legal possibility of a revalorization of mortgage debts is to be recognized under the German law now in force, especially under § 242 of the Civil Code. In the case of mortgage debts, as a rule – at least when paper money is taken as a basis – the debtor has received a corresponding increase in value due to the considerably increased value of the land. Whether this increase in value has occurred with reference to the property located in Lüderitzbucht that is involved in the instant case must be determined by the *Kammergericht*.

It is not important whether – as the plaintiff argues – the admissibility of revalorization of mortgage debts was legally recognized in 1920 or whether revalorization was accepted later, under the influence of continuing inflation. Incorrect legal conceptions of the year 1920 are not decisive today.

Under § 242 of the Civil Code, the requirements of good faith (*Treu und Glauben*), taking into account commercial practice, must be considered in the individual case. A fair consideration of the interests of both sides is required. It follows from this that a general principle requiring the revalorization of every mortgage debt cannot be established. Nor will the extent of the revalorization ... be the same in each case. It will be necessary to take into account, besides the increase in terms of paper Reichsmarks of the value of the real property, which will have the principal weight, also the other circumstances of the cases: for example, the economic ability of the debtor to perform under the circumstances, whether agricultural, industrial, or city property is involved. There must also be taken into account the public charges that the property must pay. In the case of rental property the reduction of income resulting from the measures taken to protect renters deserves consideration.

The provisions of the German currency law do not stand in the way of a revalorization. It is true that under the *Gesetz über die Abänderung des Bankgesetzes* of June 1, 1909 (RGB 515) the notes of the Reichsbank are legal tender. [References to other statutory provisions omitted.] But all these provisions rested, at the time of their promulgation, on the ... assumption that the notes ... had a value equal to hard money ... The legislator had not considered the possibility of a considerable paper money inflation, let alone one of the extent that has occurred ... when these provisions were enacted ...

The permissibility of revalorization can also be shown by way of an interpretation of the contract in which the court considers what the parties would have wanted, in view of the whole purpose of the contract, if they had foreseen the possibility of a considerable degree of inflation ...

Therefore, the legal possibility of a revalorization must, in view of the considerable inflation of German paper money, be recognized as legally permissible."

**Note.** In this decision, the court dealt with the problem of hyperinflation which the legislature had refused to confront. The mortgage indebtedness in Germany in 1913 was approximately 40,000,000,000 Reichsmarks, or about one-sixth of the total German wealth. In 1923, this amount of Reichsmarks was worth less than one American cent. F. Graham, *Exchange, Prices, and Production in Hyper-Inflation: Germany, 1920–1923* (1930), 241 n. 1. The consequence of the court's decision was that the terms of hundreds of thousands of contracts were open to revision, and hundreds of new judges were hired to decide on a case-by-case basis how they should be revised.

### **Bundesgerichtshof, October 14, 1959, NJW 1959, 2203<sup>1</sup>**

"A claim for an increase in the amount of the dead rent fixed in a contract for the extraction of saltpetre at the turn of the century cannot

1. Excerpt from translation by Kurt Lipstein in B.S. Markesinis, W. Lorenz and G. Dannemann, *The German Law of Obligations*, vol. 1. *The Law of Contracts and Restitution: A Comparative Introduction* (1997).

be upheld on the ground that the intervening decline in the purchasing power of money has caused the collapse of the basis of the transaction.”

The contract, made in 1898, provided for a dead rent of 1,200 Reichsmarks. The lower court found that “it was impossible to say” why the dead rent was set at this figure. “[T]hat sum was not related to the current price of saltpetre, since the parties in 1898 did not refer to it, and indeed did not know, because there was technically no means of finding out, whether there were any extractable saltpetre at all in the area covered by the contract or if so, how much of it there might be.” According to the *Bundesgerichtshof*: “It is indeed possible that in the course of a long-term contractual relationship the balance between performance and counter-performance may become so upset that it would no longer be fair to keep the disadvantaged party to what was originally agreed. If that be so, then the principle of good faith and fair dealing which dominates the whole of our law (§ 242 BGB) requires either that the reciprocal obligations be adapted to the changed situation, supposing that the maintenance of the contract is in the interests of the parties as properly conceived, or that the contract be completely canceled.

One of the stated requirements for the application of the theory of the collapse of the basis of the transaction, and one which is especially important in cases of this kind, is that the intervening change be of a critical nature and affect the interests of the parties to a significant degree. Not every adverse modification of the prior relationship of equivalence, unforeseen by the parties at the time of the contract, justifies a departure from the principle that contracts must be adhered to (*pacta sunt servanda*).

What is really required is such a fundamental and radical change in the relevant circumstances that it would be an intolerable result quite inconsistent with law and justice to hold the party to the contract [references omitted]. This test is crucial in this case. The court below recognized this and was right to apply this test. In doing so it went thoroughly into the facts and after considering the interests of both parties came to the conclusion that the stated pre-conditions for breaking with the principle that contracts must be kept were not satisfied.”

### **Bundesgerichtshof, May 28, 1973, BGHZ 61, 31<sup>2</sup>**

“The plaintiff became a director of the defendant company in 1926. By a contract of employment dated 18 February 1935, he received a fixed salary of 50,000 Reichsmarks and a percentage of the profits. The contract provided further that his pension was to be calculated as follows: after ten years’ service 25% of 40,000 Reichsmarks with an annual increase of 1% up to a maximum of 60% after 35 years. After 20 years’ service the basic standard was to be increased to 50,000 Reichsmarks.

2. Excerpt from translation by Kurt Lipstein in B.S. Markesenis, W. Lorenz and G. Dannemann, *The German Law of Obligations*, vol. 1. *The Law of Contracts and Restitution: A Comparative Introduction* (1997), 595.



The plaintiff retired in 1951 and received from then onwards an annual pension of 15,000 DM equal to monthly payments of 3,083.33 DM. In 1969, plaintiff asked for an increase, which was refused. He claimed an additional pension at the monthly rate of 804.17 DM on the ground that wages and salaries and the general cost of living had increased considerably.”

The Court of Appeal upheld the plaintiff's claim on the grounds that cost of living had risen by 45.2 points between 1950 and 1970, and the pension must therefore be adjusted “to the changed conditions.” The *Bundesgerichtshof* dismissed the defendant's appeal.

“Normally both contracting parties envisage that the pension provided to a director or manager will serve, either alone or with other revenues, to assure for the beneficiary a standard of living commensurate to his position hitherto in case of old age, premature incapacity to work or of dismissal without any expectation of an equivalent means of livelihood of another kind. Here, too, the pension can be regarded as part of the remuneration for services which the beneficiary has given before he retired and which contributes to the prosperity of the enterprise, the profits of which now feed the pension. This balance, assumed to exist when the obligation to pay a pension is incurred, is seriously disturbed if, as a result of a fall in the purchasing power as compared with that outlined previously, the pension can no longer fulfill by its agreed amount its intended function which is to guarantee the previous standard of living completely or in part. The enterprise, on the other hand, is not affected in the result by the depreciation of money, for generally the revenues have at least kept up with the increase in prices or they have even overtaken it as a result of economic growth. It is true that costs, especially wages and salaries, have increased as well. The proportion of the individual pension obligations, however, the nominal value of which has remained the same, has decreased correspondingly.

The special features set out here preclude a comparison with other obligations of long duration which are not concerned with maintenance (e.g. for the production of potash) as the practice of this court cited by the appellant has underlined expressly [references omitted].”

## Chinese Law

### Judicial Interpretation (II) of Contract Law

#### ARTICLE 26

After the conclusion of a contract, when an unforeseeable major change of event occurs that is beyond the normal commercial risk and yet is not force majeure, the court may at the request of the obligor, modify or terminate the contract based on the principle of fairness and the factual situation of the case, if continued performance would result in obvious unfairness and the purpose of the contract cannot be fulfilled.

**Note.** According to a Supreme People's Court rule that encourages restraint in use of the doctrine, an approval from the Supreme Court or



provincial high court is needed before the doctrine of change of circumstances can be applied.<sup>1</sup>

This judicial interpretation will be superseded by Articles 533 and 580. Article 533 resembles German Civil Code §313 and Article 580-2 is a version of the common law frustration of purpose. As a last-minute addition to the draft, Article 580-2 primarily works to excuse performance that can only be made at an excessive cost, but the non-performing party is still liable for damages. In principle, as in German law, the non-breaching party is always entitled to performance regardless of the cost of performance.

When a performance becomes excessively more expensive after a contract is concluded, the burdened party would have two options: he can seek to terminate the contract under Article 533 or if that fails, he will ask to be excused from performing the contract and pay damages instead. Clear standards will need to be established to distinguish these two situations.

## Chinese Civil Code

### ARTICLE 533

After a contract is formed, if a condition that formed the basis of the contract has undergone significant change, which was unforeseeable and beyond normal commercial risk, and that continued performance will be manifestly unfair to one party, the adversely affected party is entitled to renegotiate; if an agreement cannot be reached within a reasonable time, the parties can request the people's court or arbitration institution to modify or terminate the contract.

The people's court or the arbitration institution shall base its decisions on the facts and modify or terminate the contract according to the principle of fairness.

### ARTICLE 580

Where a party failed to perform a non-monetary obligation or if his performance was not in conformity with the agreement, the other party may demand performance, except in one of the following situations:

- (1). performance is impossible in law or in fact;
- (2). the subject matter of the obligation is unsuitable for enforced performance or the cost of performance would be excessively high;
- (3). the obligee fails to demand performance within a reasonable time.

When one of the aforementioned circumstances has arisen and resulted in the nonfulfilment of purpose of contract, the people's court or the arbitration institution may terminate the contractual rights and obligations at the request of the party. However, the termination does not affect liability for breach of contract (Modifying Contract Law, Article 110).

1. 《关于正确适用<中华人民共和国合同法>若干问题的解释（二）服务党和国家的工作大局的通知》（法【2009】165号）Notice

from Supreme Court re Interpretation II of Contract Law (Fa [2009] No.165).

**ZT Corp. v. XD Corp.**, 常州新东化工工发展有限公司、江苏正通宏泰股份有限公司建设工程施工合同纠纷、技术委托开发合同纠纷 **Supreme People's Court (2015)民提字第39号 (2015) Min Ti Zi No. 39**

ZT Corp agreed to complete a boiler flue gas desulfurization project for XD Corp. The contract was concluded on September 29, 2011. After the contract, the municipal government issued a new energy-saving and pollution reduction policy that banned the use of coal-burning boilers within the area where the defendant, XD Corp, was located. The order to suspend the project was issued to XD Corp in mid October and XD Corp was also ordered to disable its coal-burning boiler all together by June, 2012. XD immediately terminated the contract relying upon the doctrine of change of circumstances citing the sudden change of state policy.

ZT Corp agreed that the duty to perform shall be terminated. They sued, however, to recover expectation damage and alleged that XD Corp breached the contract. ZT's main arguments were that change of circumstances should only be applied when there is a state policy change at the national level rather than the local policy directive issued by a municipal government and that it is a normal commercial risk that parties should have foreseen at the time of contracting. Both trial court and appellate court refused to allow relief under the doctrine of change of circumstances. Both courts held that XD Corp breached the contract and awarded a sizable portion of the expectation damage, 1.32 million yuan out of 1.84 million yuan (full expectation damage was calculated at a 41.74% profit margin, the rate of profit on the prevailing market).

The Supreme Court reversed the decisions and held that XD Corp is entitled to terminate the contract under the doctrine of change of circumstances and only liable for the cost already incurred before the policy change in the amount of 52,000 yuan. The Supreme Court held that "[t]he objective circumstances surrounding the contractual performance had changed significantly since the promulgation of policy directive. As a result, the purpose of the contract cannot be fulfilled and continued performance is meaningless. Such a change is not one that belongs to normal commercial risk and one that can be foreseen by the parties. As such, the policy change is a change of circumstances as defined by art. 26 of the Judicial Interpretation II of Contract Law."

**An Y v. Shao QZ**, 安妍与邵庆珍房屋买卖合同纠纷 **Supreme People's Court (2017) 最高法民再26号; (2017) Zui Gao Fa Min Zai No. 26**

On May 28, 2006, An and Shao reached an agreement where Shao was to lease a house to An for four years from July 1, 2006 to June 30, 2010, and Shao will sell An the house upon the expiration of the term of the lease. This agreement was made in order to avoid a legal obstacle that prevented the seller, Shao, from selling the house right away. The sales price was set at RMB 608,000 yuan. Upon the conclusion of the term of the lease, Shao refused to sell the house to An at the contract price because the market

price had tripled. She demanded that she shall be allowed to sell the house at the market price of RMB 2,548,555 yuan, claiming that the market price change constituted change of circumstances. The trial court upheld the contract and denied that there was a change of circumstances.

The decision was reversed by the appellate court. An extra 700,000 yuan was ordered as a remedy for the change in market price in order to avoid an obvious unfair outcome. The appellate court deemed the price change to be a change of circumstances.

An objection to the appellate court's decision was made by the office of the Supreme Procurator. That office is not only in charge of prosecutions but has the duty to supervise the work of judiciary. It can appeal a decision on its own initiative. The Supreme People's Court reopened the case. The Court held that the price change might be unforeseeable but that it still is to be considered a normal commercial risk. Therefore, the performance of the contract was not excused, and Shao was ordered to perform her contractual obligations.

### **The Draft Common Frame of Reference**

#### **ARTICLE III. 1:110 VARIATION OR TERMINATION BY COURT ON A CHANGE OF CIRCUMSTANCES**

- (1). An obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished.
- (2). If, however, performance of a contractual obligation or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may:
  - (a). vary the obligation in order to make it reasonable and equitable in the new circumstances; or
  - (b). terminate the obligation at a date and on terms to be determined by the court.
- (3). Paragraph (2) applies only if:
  - (a). the change of circumstances occurred after the time the obligation was incurred;
  - (b). the debtor did not at that time take into account, and could not reasonably be expected to take into account, the possibility or scale of that change of circumstances;
  - (c). the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances; and
  - (d). the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation.

## The Unidroit Principles of International Commercial Contracts

### ARTICLE 6.2.1 CONTRACT TO BE OBSERVED

Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.

### ARTICLE 6.2.2 DEFINITION OF HARDSHIP

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

- (a). the events occur or become known to the disadvantaged party after the conclusion of the contract;
- (b). the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
- (c). the events are beyond the control of the disadvantaged party; and
- (d). the risk of events was not assumed by the disadvantaged party.

### ARTICLE 6.2.3 EFFECTS OF HARDSHIP

- (1). In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.
- (2). The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.
- (3). Upon failure to reach agreement within a reasonable time either party may resort to the court.
- (4). If the court finds hardship it may, if reasonable,
  - (a). terminate the contract at a date and on terms to be fixed; or
  - (b). adapt the contract with a view to restoring its equilibrium.

## V. REMEDIES

### 1. Specific Performance

#### a. Origins

In England, law was administered by two sets of courts: the common law courts and the court of equity which was presided over by the Chancellor. The role of the court of equity was to help parties whose cause was deemed to be just but who could not get relief from a

court of common law. One such case was the person who could not receive an adequate remedy in an action of *assumpsit*. The common law courts could award damages when a promise was broken but they could not order the promise breaker to perform. A court of equity could do so: the court of equity “acts on the conscience,” which meant that the court could order a party to be imprisoned until he was prepared to do as the court ordered. But since the role of the court of equity was only to provide a remedy when the remedy at common law was inadequate, that court would only order specific performance of an obligation when an award of damages from a common law court would not be an adequate remedy.

In countries which had adopted Roman law, a crucial role was played by two Roman texts. According to one: “If an object sold is not delivered, there is an action for damages (*id quod interest*), that is, for the damages suffered by the buyer by not having the object (*hoc est quod rem habere interest emptoris*).”<sup>1</sup> According to the other: “[A]s he did not do as he promised, he is to be adjudged to pay a sum of money, as is the case in all obligations to do something.”<sup>2</sup> It is not clear what these statements meant to the Romans. Their meaning was controversial throughout the Middle Ages and early modern times, some jurists claiming that a court could never order specific performance in such cases, and others claiming that it could.<sup>3</sup> Pothier took the position that when a party defaulted on an obligation to do or not to do something, the only remedy available against him was an action for damages. As we will see, this rule passed into Article 1142 of the French Civil Code, only to be subverted by the courts.

The late scholastics and the natural lawyers took the position that, whatever the Roman law might be, as a matter of “natural law,” the party owing a performance should have to do so. According to Molina: “But surely if the Roman law or any other means that when a person is obligated to do something, he then has the option not to perform but only to pay damages, that would plainly be irrational . . . .”<sup>4</sup> He cited the Canon law which was to the contrary.<sup>5</sup> Grotius agreed that “as a matter of natural law, whoever promises to do something is obligated to do it if he can” although he thought that only damages could be recovered in civil law.<sup>6</sup> As Reinhard Zimmermann pointed out, this was the position that triumphed in nineteenth-century Germany after the natural law era was over. As we will see, it was incorporated in § 241 of the German Civil Code.

1. Dig. 19.1.1.pr.

2. Dig. 42.1.13.1.

3. Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990), 773–6.

4. Ludovicus de Molina, *De iustitia et iure tractatus* (1614), II, disp. 562, no. 5.

5. *Ibid.*

6. Hugo Grotius, *Institutiones iuris Hollandici* (trans. J. van der Linden, ed. H. F.W.D. Fischer, 1962), III.iii.41.

## b. Modern Law

### English Law

Guenter Treitel, *The Law of Contract* (10th edn., 1999), 950–60

#### “(1) *Granted where damages not ‘adequate’*”

The traditional view is that specific performance will not be ordered where damages are an ‘adequate’ remedy.<sup>1</sup> After illustrating this requirement, we shall see that it now requires some reformulation.

- (a). ***Availability of satisfactory equivalent.*** Damages are most obviously an adequate remedy where the claimant can get a satisfactory equivalent of what he contracted for from some other source. For this reason specific performance is not generally ordered of contracts for the sale of commodities, or of shares, which are readily available in the market.<sup>2</sup> In such cases the claimant can buy in the market and is adequately compensated by recovering the difference between the contract and the market price by way of damages. Indeed, he is required to make the substitute purchase in performance of the duty to mitigate his loss. If he fails to do so, he cannot recover damages for extra loss suffered because the market has risen after the date when the substitute contract should have been made. To award him specific performance in such a case would, in substance, conflict with the principles of mitigation<sup>3</sup> as well as being oppressive to the defendant.<sup>4</sup> Similar reasoning seems to underlie the rule that a contract to lend money cannot be specifically enforced by either party:<sup>5</sup> it is assumed that damages can easily be assessed by reference to current rates of interest.

1. *Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd.* [1998] A.C. 1 at 11.

2. *Cud v. Rutter* (1719) 1 P.Wms. 570; *Re Schwabacher* (1908) 98 L.T. 127 at 128; cf. *Fothergill v. Rowland* (1873) L.R. 17 Eq. 137; *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] A.C. 130; *aliter* if the shares are not readily available: *Duncuft v. Albrecht* (1841) 12 Sim. 189; *Langen & Wind Ltd v. Bell I* [1972] Ch. 685; *Jobson v. Johnson I* [1989] 1 W.L.R. 1026; *Grant v. Cigman* [1996] 2 B.C.L.C. 24; or if the contract is for the sale of shares giving a controlling interest in the company, *Harvela Investments Ltd. v. Royal Trust Co. of Canada (C.I.) Ltd* [1986] A.C. 207.

3. See *Buxton v. Lister* (1746) 3 Ark. 383 at 384.

4. See *Re Schwabacher* (1908) 98 L.T. 127, where shares rose in value after breach. In such a case the defendant could be given the option of transferring the shares or paying the difference between contract

and market price on the day fixed for performance, as in *Colt v. Nettervill* (1725) 2 P. Wms. 301. See also *Whiteley Ltd. v. Hilt* [1918] 2 K.B. 808; *M.E.P.C. v. Christian Edwards* [1978] Ch. 281 at 293 (affirmed on other grounds [1981] A.C. 205); *Chinn v. Hochstrasser* [1979] Ch. 447 (reversed on other grounds [1981] A.C. 533).

5. *Rogers v. Challis* (1859) 27 Beav. 175 (suit by lender); *Sichel v. Mosenthal* (1862) 30 Beav. 371 (suit by borrower: decision based on lack of mutuality rather than adequacy of damages); cf. *Larios v. Bonnany y Gurety* (1873) L.R. 5 C.P. 346. By statute the court can specifically enforce a contract to take debentures in a company, that is, to make a secured loan to the company: Companies Act 1985, s.195 reversing *South African Territories Ltd v. Wallington* [1898] A.C. 109. A contract to subscribe for shares in a company is also specifically enforceable: *Odessa Tramways Co. v. Mendel* (1878) 8 Ch.D. 235; *Sri Lanka Omnibus Co. v. Perera* [1952] A.C. 76.



Damages will, on the other hand, not be regarded as an adequate remedy where the claimant cannot obtain a satisfactory substitute. The law takes the view that a buyer of land or of a house<sup>6</sup> (however ordinary) is not adequately compensated by damages, and that he can therefore get an order of specific performance.<sup>7</sup> Even a contractual license to occupy land, though creating no interest in the land,<sup>8</sup> may be specifically enforced.<sup>9</sup> ...

- (b). **Damages hard to quantify.** A second factor which is relevant (though not decisive<sup>10</sup>) in considering the adequacy of damages is the difficulty of assessing and recovering them. This is one reason why specific performance has been ordered of contracts to sell (or to pay) annuities,<sup>11</sup> and of a sale of debts proved in bankruptcy,<sup>12</sup> the value of such rights being uncertain ...
- (c). **Appropriateness of the remedy.** The more satisfactory approach found in the cases just discussed is also expressed in dicta to the effect that the availability of specific performance depends on 'the *appropriateness* of that remedy in the circumstances of each case.' The question is not whether damages are an 'adequate' remedy, but whether specific performance will 'do more perfect and complete justice than an award of damages.'<sup>13</sup> The point was well put in a case concerned with the analogous question whether an injunction should be granted: 'The standard question ..., Are damages adequate remedy? Might perhaps, in the light of the authorities in recent years, be rewritten: Is it just in all circumstances that the plaintiff should be confined to his remedy in damages ... ?'<sup>14</sup> ...

## (2) Discretionary

Specific performance is a discretionary remedy: the court is not bound to grant it merely because the contract is valid at law and cannot be impeached on some specific equitable ground such as misrepresentation

6. Fry, *Specific Performance* (6th edn.), § 62. Damages are, however, an adequate remedy for breach of a "lockout" agreement relating to land since such an agreement is intended merely to protect the prospective purchaser from wasting costs and does not give him any right to insist on conveyance of the land: *Tye v. House* [1997] 2 E.G.L.R. 171.

7. Unless he elects to claim damages, as in *Meng Leong Developments Pte. Ltd v. Tip Hong Trading Co. Pte. Ltd.* [1985] A.C. 511.

8. See *Ashburn Anstalt v. Arnold* [1989] Ch. 1, overruled on another point in *Prudential Assurance Co. Ltd v. London Residuary Body* [1992] 2 A.C. 386.

9. *Verrall v. Great Yarmouth B.C.* [1981] Q.B. 202.

10. *Soc. des Industries Metallurgiques S. A. v. Bronx Engineering Co. Ltd* [1975] 1 Lloyd's Rep. 465.

11. *Ball v. Cogg's* (1710) 1 Bro. P.C. 140; *Kenney v. Wexham* (1822) 6 Madd. 355; *Adderley v. Dixon* (1824) 1 C. & S. 607 at 611; *Clifford v. Turrell* (1841) 1 Y. & C.C.C. 138; *Beswick v. Beswick* [1968] A.C. 58; see however Fry, *Specific Performance* (6th edn.), pp. 30, 111, 112; *Crampton v. Varna Ry.* (1872) L.R. 7 Ch. App. 562.

12. *Adderly v. Dixon* (1824) 1 C. & S. 607.

13. *Tito v. Waddell* (No. 2) [1977] Ch. 106 at 322. *Rainbow Estates Ltd v. Tokenhold* [1998] 2 All E.R. 860 et 868.

14. *Evans Marshall & Co. Ltd. v. Bertola S.A.* [1973] 1 W.L.R. 349 et 179.



or undue influence.<sup>15</sup> The discretion is, however, 'not an arbitrary ... discretion, but one to be governed as far as possible by fixed rules and principles.'<sup>16</sup> ...

### (3) *Contracts not specifically enforceable*

(a) *Contracts involving personal service.* It has long been settled that equity will not, as a general rule, enforce a contract of personal service.<sup>17</sup> Specific enforcement against the employee was thought to interfere unduly with his personal liberty ...

The equitable principle applies to all contracts involving personal service even though they are not strictly contracts of service. Thus an agreement to allow an auctioneer to sell a collection of works of art cannot be specifically enforced<sup>18</sup> by either party, though specific enforcement would hardly be an undue interference with personal liberty, even in a suit against the auctioneer. Again, an agreement to enter into a partnership will not be specifically enforced as 'it is impossible to make persons who will not concur carry on a business jointly, for their common advantage.'<sup>19</sup> The court can, however, order the execution of a formal partnership agreement, and leave the parties to their remedies on the agreement.<sup>20</sup> Similarly, the court can order the execution of a service contract even though that contract, when made, may not be specifically enforceable.<sup>21</sup>

The equitable principle here under discussion applies only where the services are of a personal nature. There is no general rule against the specific enforcement of a contract merely because one party undertakes to provide services<sup>22</sup> under it. Thus specific performance can be ordered of a contract to publish a piece of music<sup>23</sup> and sometimes of contracts to build. It

15. *Stickney v. Keeble* [1915] A.C. 386 et 419.

16. *Lamare v. Dixon* (1873) L.R. 6 H.L. 414 et 423; *Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd.* [1998] A.C. 1 at 16.

17. *Johnson v. Shrewsbury and Birmingham Ry.* (1853) 3 D.M. & G. 358; *Brett v. East India and London Shipping Co. Ltd* (1864) 2 H. & M. 404; *Britain v. Rossiter* (1883) 11 Q.B.D. 123 at 127; *Rigby v. Connol* (1880) 14 Ch.D. 482 at 487. Cf. *Taylor v. N.U.S.* [1967] 1 W.L.R. 532; *Chappell v. Times Newspapers Ltd* [1975] 1 Ch.D. 482 (injunction); *The Scaptrade* [1983] 2 A.C. 694 at 700–1; *Wishart v. National Association of Citizens Advice Bureaux* [1990] I.C.R. 794; *Wilson v. St. Hellen's B.C.* [1998] 3 W.L.R. 1070 at 1081.

18. *Chinnock v. Sainsbury* (1861) 30 L.J. Ch. 409; cf. *Mortimer v. Beckett* [1920] 1 Ch. 571.

19. *England v. Curling* (1844) 8 Beav. 129 at 137. On the same principle, specific performance has been refused of a house-

sharing arrangement which had been made between members of a family who later quarreled: *Burrows and Burrows v. Sharp* (1991) 23 H.L.R. 82, where the basis of liability was not contract but proprietary estoppel.

20. As in *England v. Curling*, where the object of obtaining such a decree was to ascertain the exact terms that had been agreed, and then to prevent one of the contracting parties from competing in business with the other.

21. *C. H. Giles & Co. Ltd v. Morris* [1972] 1 W.L.R. 307; cf. *Posner v. Scott-Lewis* [1987] Ch. 25.

22. E.g. *Regent International Hotels v. Page-guide, The Times*, May 13, 1985 (injunction against preventing claimant company from managing a hotel); *Posner v. Scott-Lewis* [1987] Ch. 25.

23. *Barrow v. Chappel & Co.* (1951), now reported in [1976] R.P.C. 355, and cited in *Joseph v. National Magazine Co. Ltd* [1959] Ch. 14; contrast *Malcolm v. Chancellor Masters and Scholars of the University of*

has, indeed, been suggested that a time charterparty cannot be specifically enforced against the shipowner because it is a contract for services<sup>24</sup>; but the services that the shipowner undertakes under such a contract will often be no more personal than those to be rendered by a builder under a building contract. Denial of specific performance in the case of time charters is best explained on other grounds.”

### Law in the United States

#### Restatement (Second) of Contracts

##### § 359. EFFECT OF ADEQUACY OF DAMAGES

(1) Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party . . .

##### § 369. FACTORS AFFECTING ADEQUACY OF DAMAGES

In determining whether the remedy in damages would be adequate, the following circumstances are significant:

- (a). the difficulty of proving damages with reasonable certainty,
- (b). the difficulty of procuring a suitable substitute performance by means of money awarded as damages, and
- (c). the likelihood that an award of damages could not be collected.

#### E. Allan Farnsworth, *Contracts* (3rd edn., 1999), 781

“A court will not grant specific performance of a contract to provide a service that is personal in nature. This refusal is based in part on the difficulty of passing judgment on the quality of performance . . . It is also based on the undesirability of compelling the continuance of personal relations after disputes have arisen confidence and loyalty have been shaken and the undesirability, in some instances, of imposing what might seem like involuntary servitude.”

### French Law

#### French Civil Code

##### ARTICLE 1217

A party towards whom an undertaking has not been performed or has been performed imperfectly, may:

- . refuse to perform or suspend performance of his own obligations;
- . seek enforced performance in kind of the undertaking;
- . request a reduction in price;

*Oxford, The Times*, December 19, 1990, where specific performance of a contract to publish a book was refused on the ground

that continued co-operation between author and publishers would have been required.

<sup>24</sup>. *The Scaptrade* [1983] 2 A.C. 94 at 700–1.

- . provoke the termination of the contract;
- . claim reparation of the consequences of non-performance.

## ARTICLE 1221

A creditor of an obligation may, having given notice to perform, seek performance in kind unless performance is impossible or if there is a manifest disproportion between its cost to the debtor and its interest for the creditor.

**German Law****German Civil Code**

## § 241. OBLIGATION TO PERFORM

The effect of an obligation is that the person owed performance is entitled to claim performance from the person who owes it.

**Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn., trans. by Tony Weir, 1998), 505–9**

“In German law and in related systems it is axiomatic that a creditor has the right to bring a claim for performance of a contract and to obtain a judgment ordering the debtor to fulfil it. For this purpose it is immaterial whether the debtor’s obligation is to deliver goods pursuant to a sale, to vacate a dwelling house, or to produce a work of art. The view that it is of the very essence of an obligation that it be actionable in this sense is so fundamental that it is not expressly stated in any legislative text, but the words of § 241 of the Civil Code, the creditor is entitled, on the grounds of the creditor-debtor relationship, ‘to demand performance from the debtor’, imply that actual performance may be demanded before a court and that a judgment ordering performance in kind may be issued by it.

A judgment ordering the debtor to perform his contract in kind can be issued only if performance by the debtor is still *possible*. As the Reichsgericht once said, it would be ‘nonsensical to order a person to perform when it has been established that performance is objectively impossible’ (RGZ 107, 15, 17). Accordingly a judgment for performance cannot be issued if, for instance, a picture has been destroyed after sale, or if a ship has been requisitioned while under charter, or if, just before the première, an opera-singer is rendered so hoarse by a bad cold that for the duration she cannot sing; in such cases the creditor can bring only a claim for damages . . .

It is clear from the Civil Code and the Code of Civil Procedure that their draftsmen believed that a disappointed contractor who decided to sue would always choose to claim performance. This is not what happens in practice, but their belief explains the fact that several texts concern themselves in loving detail with the creditor who, having brought a claim for performance, then finds that this is not the right step and that a claim for damages makes better sense. Thus, according to § 268 Code of Civil Procedure, it is not a change of claim (*Klageänderung*) of which the

defendant can complain as being an unfair surprise or procedural trick if a plaintiff in the course of a suit abandons his claim for performance in kind and prosecutes his claim for damages instead. A plaintiff who has actually obtained a judgment for performance may, instead of executing it, wish to proceed immediately to a judgment for damages; this case also has been foreseen and carefully regulated. By § 283 Civil Code the creditor who has obtained a judgment for performance may, instead of executing it, wish to proceed immediately to a judgment for damages; this case also has been foreseen and carefully regulated. By § 283 Civil Code the creditor who has obtained judgment for performance can fix a time within which performance from the debtor must be forthcoming. On the expiry of this period the plaintiff can forthwith institute a claim for damages, against which the only admissible defence is that performance has been rendered impossible by circumstances not entailing the defendant's responsibility and arising after the judgment for performance was handed down (see RGZ 107, 15, 19). These well-intentioned provisions are rarely used today. They stem from the legislator's belief that the creditor who did not know or could not prove that performance by the debtor was impossible would always bring a claim for performance. Today commercial men resolve this uncertainty differently: they grant the debtor an additional period for performance in accordance with § 326 Civil Code and, if this period elapses without result, they forthwith institute a claim for damages . . .

Claims for performance may not be very frequent in practice, since creditors bring them only when their interest in performance cannot easily be reckoned in money, but it remains the theory that, in a case where performance is still possible and the creditor so elects, the courts are bound to deliver judgment ordering the debtor to perform . . . If the claim on which the creditor has obtained judgment is that the debtor should take some positive action other than handing over property, a distinction is made. If the act in question is one which could be equally well performed by someone else, that is, it need not be performed by the debtor personally but is, as the Code of Civil Procedure puts it, *vertretbar*, then the method of execution – the only method – is for the creditor, on the authority of the court granted at his request, to have the act performed by a third party at the expense of the debtor (*Ersatzvornahme*, § 887 Code of Civil Procedure).

As examples of acts which are *vertretbar*, or capable of substitute performance, one may cite manual tasks which call for no especial talent and can therefore be carried out by third parties – the execution of building operations (LG Hagen JR 1948, 314), the installation of a lift in an apartment block (KG JW 1927, 1945), the printing of a manuscript (OLG Munich MDR 1955, 682). The making of an extract from the books of a business or the production of its accounts may also be *vertretbar* if an expert could do it after inspecting the debtor's records (OLG Hamburg MDR 1955, 43).

If the act to which the creditor lays claim is one which can be performed only by the debtor himself, it is said to be *unvertretbar*. In such a case the method of execution provided by the Code of Civil Procedure (§ 888) is to threaten the unwilling debtor with a fine or imprisonment. Should the debtor still not perform, he may be imprisoned for up to

six months in all; fines, unlimited in amount, are collected like judgment debts, and go to the Treasury . . .

[These means of execution cannot] be used against a debtor whose obligation is to do something which calls for special artistic or scientific talent, for here also the performance of the act does not depend exclusively on the debtor's will. However good his intentions may be, a composer cannot compose his sonata nor a law professor write his commentary without the right inspiration, mood, energy, and other preconditions of great spiritual creativity (see OLG Frankfurt OLGE 29, 251)."

## Chinese Law

### Chinese Civil Code

#### ARTICLE 577

Where a party fails to perform his contractual obligations or where the performance is non-conforming with the agreement, he shall bear liability for breach of contract by continuing to performance, taking remedial measures, paying damages and so forth. (previously Contract Law, Article 107)

#### ARTICLE 580

Where a party failed to perform a non-monetary obligation or if his performance was not in conformity with the agreement, the other party may demand performance, except in one of the following situations:

- (1). the performance is impossible in law or in fact;
- (2). the subject matter of the obligation is unsuitable for enforced performance or the cost of performance would be excessively high;
- (3). the obligee fails to demand performance within a reasonable time.

When one of the aforementioned circumstances has arisen and resulted in the nonfulfilment of purpose of contract, the people's court or the arbitration institution may terminate the contractual rights and obligations at the request of the party. However, the termination does not affect liability for breach of contract.

**Note.** Consider the relief that each legal system would give (1) when the contract is to obtain some unique performance, such as the purchase of a painting, and (2) when the contract is to obtain fungible goods, such as steel, which are readily available on the market at the prevailing market price. In the first case, could the plaintiff obtain the picture? In the second case, is the plaintiff any better or worse off whether the defendant is ordered to perform or the plaintiff receives damages equal to the difference between the contract and market price? Consider then whether it matters that the common law, French law, and German law adhere to different rules.

## 2. Damages

### a. The General Principle

#### English Law

**Guenter Treitel, *The Law of Contract* (10th edn., 1999), 873**

“The object of damages for breach of contract is to put the victim ‘so far as money can do it. ... in the same situation ... as if the contract had been performed’ [citing *Robinson v. Harman*, (1848) 1 Ex. 850, 855]. In other words, the victim is to be compensated for the loss of his bargain, so that his expectations arising out of or created by the contract are protected.”

#### Law in the United States

#### Restatement (Second) of Contracts

##### § 347 MEASURE OF DAMAGES IN GENERAL

Subject to the limitations stated in §§ 350–51, the injured party has a right to damages based on his expectation interest as measured by

- (a). the loss in the value to him of the other party’s performance caused by its failure or deficiency, plus
- (b). any other loss, including incidental or consequential loss, caused by the breach, less
- (c). any cost or other loss that he has avoided by not having to perform.

**Note.** § 344 defines the “expectation interest as a party’s interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed.”

#### French Law

#### French Civil Code

##### ARTICLE 1231–2

The damages due to the person owed the performance are, in general, the loss which he has incurred plus the gain of which he was deprived with the exceptions and qualifications to be described.

#### German Law

#### German Civil Code

##### § 249 NATURE AND EXTENT OF COMPENSATION

One who is obligated to make compensation must bring about the condition that would have existed if the circumstance which gave rise to his duty to compensate had not arisen.

## Chinese Law

### Chinese Civil Code

#### ARTICLE 584

Where a party fails to perform his contractual obligations or where his performance of the contractual obligations is not in conformity with the agreement, thereby causing a loss to the other party, the amount of damages shall be equal to the loss sustained as a result of the breach, including the benefits that could have been obtained after the performance of the contract, but shall not exceed the loss that the breaching party foresaw or ought to have foreseen at the time of the conclusion of the contract as a possible consequence of the breach of contract. (previously Contract Law, Article 113)

### b. Excessive Cost of Performance

#### English Law

#### **Ruxley Electronics and Construction Ltd v. Forsyth; Laddingford Enclosures Ltd v. Forsyth, [1994] 3 All ER 801**

“The defendant contracted with the two plaintiff companies to build a swimming pool in his garden and a building to enclose it for a total price of £70,178. The contract expressly provided that the maximum depth of the pool should be 7 ft 6 in. After the work had been completed, the owner discovered that the maximum depth was only 6 ft 9 in and that at the point where people would dive into the pool the depth was only 6 ft . . . Although it was accepted that the failure to provide the required depth was a breach of contract, the trial judge found that the shortfall in depth had not decreased the value of the pool and . . . awarded the owner £2,500 general damages for loss of amenity on his counterclaim . . . The Court of Appeal allowed the [defendant’s] appeal, holding that it was not unreasonable to award as damages the cost of replacing the swimming pool in order to make good the breach of contract, even though the shortfall in the depth of the pool had not decreased its value. The court awarded the owner £21,560 damages against R[uxley]. R[uxley] appealed to the House of Lords.”

Lord Bridge of Harwich. “The cogent argument of Mr Jacob for the respondent, reduced to its bare essentials, can, I think, be summarised in three propositions. (1) The judge’s award of £2,500 damages to the respondent for ‘loss of amenity’ demonstrates that the respondent suffered a real loss for which he is entitled to be compensated. (2) In a building contract case there is no admissible head of damages capable of assessment by reference to such concepts as loss of amenity, inconvenience or loss of aesthetic satisfaction. These are imponderables which the court can only evaluate by plucking figures out of the air. If a possible head of damage of this nature were to be admitted in building contract cases, this would introduce chaotic uncertainty into the law and undermine clear and well-settled principles. (3) By these well-settled principles damages in a building contract case can only be assessed by reference to diminution in value



or cost of reinstatement. There being here no diminution in value, the only available measure of damages to compensate the respondent for his real loss is the cost of reinstatement.

Attractive as was Mr Jacob's development of this argument, it seems to me to suffer from an inherent logical flaw in that it leads from the premise that a loss has been suffered which is incapable of economic measurement to the conclusion that it must be compensated by reference to a measure of economic loss, namely the cost of reinstatement, which has not been and will not be incurred . . .

[T]o hold in a case such as this that the measure of the building owner's loss is the cost of reinstatement, however unreasonable it would be to incur that cost, seems to me to fly in the face of common sense."

Lord Mustill. "My Lords, I agree that this appeal should be allowed . . . I add some observations of my own on the award by the trial judge of damages in a sum intermediate between on the one hand the full cost of reinstatement and on the other the amount by which the malperformance has diminished the market value of the property on which the work was done: in this particular case, nil.

The proposition that these two measures of damage represent the only permissible bases of recovery lies at the heart of the employer's case.

In my opinion there would indeed be something wrong if, on the hypothesis that cost of reinstatement and the depreciation in value were the only available measures of recovery, the rejection of the former necessarily entailed the adoption of the latter; and the court might be driven to opt for the cost of reinstatement, absurd as the consequence might often be, simply to escape from the conclusion that the promisor can please himself whether or not to comply with the wishes of the promisee which, as embodied in the contract, formed part of the consideration for the price. Having taken on the job the contractor is morally as well as legally obliged to give the employer what he stipulated to obtain, and this obligation ought not to be devalued. In my opinion, however, the hypothesis is not correct. There are not two alternative measures of damage, at opposite poles, but only one: namely the loss truly suffered by the promisee. In some cases the loss cannot be fairly measured except by reference to the full cost of repairing the deficiency in performance. In others, and in particular those where the contract is designed to fulfil a purely commercial purpose, the loss will very often consist only of the monetary detriment brought about by the breach of contract. But these remedies are not exhaustive, for the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure. This excess, often referred to in the literature as the 'consumer surplus' (see e.g. the valuable discussion by Harris, Ogus and Phillips, 'Contract Remedies and the Consumer Surplus' (1979) 95 LQR 581) is usually incapable of precise valuation in terms of money, exactly because it represents a personal, subjective and non-monetary gain. Nevertheless, where it exists the law should recognise it and compensate the promisee if the misperformance takes it away."

## Law in the United States

### Restatement (Second) of Contracts

#### § 348 ALTERNATIVES TO LOSS IN VALUE OF PERFORMANCE

- (2). If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on
  - (a). the diminution in the market price of the property caused by the breach, or
  - (b). the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him.

### **Peevyhouse v. Garland Coal & Mining Co. 382 P.2d 109 (Okl. 1962)**

“Briefly stated, the facts are as follows: plaintiffs owned a farm containing coal deposits, and in November, 1954, leased the premises to defendant for a period of five years for coal mining purposes. A ‘strip mining’ operation was contemplated in which the coal would be taken from pits on the surface of the ground, instead of from underground mine shafts. In addition to the usual covenants found in a coal mining lease, defendant specifically agreed to perform certain restorative and remedial work at the end of the lease period. It is unnecessary to set out the details of the work to be done, other than to say that it would involve the moving of many thousands of cubic yards of dirt, at a cost estimated by expert witnesses at about \$29,000.00. However, plaintiffs sued for only \$25,000.00 . . .

Plaintiffs introduced expert testimony as to the amount and nature of the work to be done, and its estimated cost. Over plaintiffs’ objections, defendant thereafter introduced expert testimony as to the ‘diminution in value’ of plaintiffs’ farm resulting from the failure of defendant to render performance as agreed in the contract – that is, the difference between the present value of the farm, and what its value would have been if defendant had done what it agreed to do. [According to their evidence, even if the work were carried out, the farm would have a total value of \$300.00] . . .

On appeal, the issue is sharply drawn. Plaintiffs contend that the true measure of damages in this case is what it will cost plaintiffs to obtain performance of the work that was not done because of defendant’s default. Defendant argues that the measure of damages is the cost of performance ‘limited, however, to the total difference in the market value before and after the work was performed’ . . .

It is highly unlikely that the ordinary property owner would agree to pay \$29,000 (or its equivalent) for the construction of ‘improvements’ upon his property that would increase its value only about (\$300) three hundred dollars. The result is that we are called upon to apply principles of law theoretically based upon reason and reality to a situation which is basically unreasonable and unrealistic . . .

The primary purpose of the lease contract between plaintiffs and defendant was neither 'building and construction' nor 'grading and excavation'. It was merely to accomplish the economical recovery and marketing of coal from the premises, to the profit of all parties. The special provisions of the lease contract pertaining to remedial work were incidental to the main object involved.

Even in the case of contracts that are unquestionably building and construction contracts, the authorities are not in agreement as to the factors to be considered in determining whether the cost of performance rule or the value rule should be applied. The American Law Institute's Restatement of the Law, Contracts, Volume 1, Sections 346(1)(a)(i) and (ii) submits the proposition that the cost of performance is the proper measure of damages 'if this is possible and does not involve *unreasonable economic waste*'; and that the diminution in value caused by the breach is the proper measure 'if construction and completion in accordance with the contract would involve *unreasonable economic waste*'. (Emphasis supplied.)

In view of the unrealistic fact situation in the instant case, . . . we are of the opinion that the 'relative economic benefit' is a proper consideration here."

**Note.** On similar facts, a court reached the opposite result in *Groves v. John Wunder Co.*, 286 N.W. 235 (1939).

### **Eastern Steamship Lines, Inc. v. United States, 112 F. Supp. 167 (Ct. Cl. 1953).**

The United States government chartered the ship Acadia to use to transport troops during World War II. The charter provided that before returning the ship, the government would "restore the Vessel to at least as good a condition and class as upon delivery . . . ."

The owner claimed \$4,000,000, which was the cost of restoring the ship to its original condition. The government claimed that it owed no more than \$2,000,000 which was the estimated value of the ship after restoration. The Court of Claims held for the government.

## **French Law**

### **French Civil Code**

#### ARTICLE 1221

A creditor of an obligation may, having given notice to perform, seek performance in kind unless performance is impossible or if there is a manifest disproportion between its cost to the debtor and its interest for the creditor.

### **François Terré, Phillippe Simler, Yves Lequette and François Chénéde, *Droit civil Les obligations* (12th edn., Paris, 2019), 834–5**

"The ordinance of 2016 also innovated by placing a new limit on specific performance (*exécution forcée en nature*): a manifest disproportion between

the cost for the debtor and the interest of the creditor. According to the Report of the President of the Republic, this new exception 'seeks to avoid certain very contested judicial decisions; when specific performance is extremely onerous for the debtor without the creditor having a true interest in obtaining performance, it would appear to be inequitable and unjustified that he can require it, when liability in damages can provide him with an adequate compensation at a much lower price.' ... This new limit on specific performance has been the object of conflicting opinions. Although some have praised the merits of a solution that prevents specific performance 'of a contract that is too onerous and leads to the ruin' of a debtor at the mercy of an 'obstinate creditor,' others have denounced 'an undermining of the contractual rights of the creditor' which reflects the influence of the economic analysis of law and *common law* rights." [citations omitted]

### German Law

#### German Civil Code

##### § 251. DAMAGES IN MONEY ...

- (1). To the extent that performance is impossible or is insufficient to compensate the party who is owed performance, the other party has the duty to compensate him in money.
- (2). Compensation can be made in money when performance is only possible with disproportionate expense ...

### Chinese Law

#### Chinese Civil Code

##### ARTICLE 580

Where a party failed to perform a non-monetary obligation or if his performance was not in conformity with the agreement, the other party may demand performance, except in one of the following situations:

- (1). performance is impossible in law or in fact;
- (2). the subject matter of the obligation is unsuitable for enforced performance or the cost of performance would be excessively high;
- (3). the obligee fails to demand performance within a reasonable time.

When one of the aforementioned circumstances has arisen and resulted in the nonfulfilment of purpose of contract, the people's court or the arbitration institution may terminate the contractual rights and obligations at the request of the party. However, the termination does not affect liability for breach of contract

**Xingyu Corp. v. Feng Yumei**, 冯玉梅诉新宇公司商品房买卖合同纠纷 (2004) 宁民四终字第470号 (2004) **Ning Min Si Zhong Zi No. 470**

Xingyu Corp is the developer of a 60,000 sqm shopping mall named "Times Square" in downtown, Nanjing. In 1998, Xingyu Corp sold Feng

Yumei a store unit on the premises of the mall while it was still under construction. The price was 368,184 yuan and the area 22.5 m<sup>2</sup>. The full amount of sale price was paid and the unit delivered. Soon after, the mall was leased to and managed by JH department store. Due to JH's mismanagement, the mall closed and JH went into bankruptcy in June, 1999. Times Square reopened in December, 1999 and closed down in January, 2002. Times Square had not been used for business since. Most of the store unit owners could not continue to operate their businesses.

In order to revitalize the assets Xinyu Corp decided to rebrand the mall and reopen it. Up to this point, ownership was not yet properly registered under the store owners name, and it was Xinyu Corp's contractual obligation to complete such registrations. This effort involved restructuring the premises and tearing down the existing stores. Xingyu Corp managed to terminate all the then-existing sales agreements and compensated the store owners for the breach of contract. Most of the store owners agreed to terminate the contract and be compensated for the damages incurred from Xingyu Corp's delay in completing the registration. Feng Yumei refused and demanded continued performance. In alternative, Feng asked for a 80 m<sup>2</sup> store in a similarly situated area or the same store on the exact same premises. Xingyu Corp tore down a partial glass wall and removed pipeline connected to the store. Feng argued that she is entitled to continued performance of the contract and that the closing down of the mall and rebranding was due to Xinyu Corp's mismanagement and ill-planned strategy. It was Xinyu's fault. Yet for Xinyu to claim there has been a change of circumstances, the change must be an unforeseeable circumstance that is neither a commercial risk nor due to anyone's fault.

In affirming the trial court's decision to terminate the contract, the appellate court, Nanjing Intermediate Court, reasoned that "[a]lthough the contract is valid and breach of the contract is indisputable, nevertheless the duty to continue performance is excused when the cost is prohibitively high. To require continued performance will inhibit the planning and operation of Times Square and disturb the balance between the interests of the parties. Consequently, damages are to be awarded in lieu of specific performance."

### **c. Liquidated Damages**

#### **English Law**

**Edwin Peel, *The Law of Contract* (14th edn., London, 2015), 1199**

"A contract may provide for the payment of a fixed sum on breach, or some other sanction. Such a provision may serve the perfectly proper purpose of enabling a party to know in advance what his liability will be; and of avoiding difficult questions of quantification. On the other hand, the courts have been reluctant to allow a party, under such a provision, to recover a sum which is obviously and considerably greater than his loss. They have therefore divided such provisions into two categories: penal clauses, which are invalid, and liquidated damages clauses, which will generally be upheld."

## **Law in the United States**

### **Restatement (Second) of Contracts**

#### § 356. LIQUIDATED DAMAGES AND PENALTIES

(1). Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on ground of public policy as a penalty.

## **French Law**

### **French Civil Code**

#### ARTICLE 1231–5

When a contract provides that the party who fails to execute an obligation will pay a certain sum as damages, the other party will not be allowed a greater or less sum. Nevertheless, the judge can, even on his own initiative, moderate or augment the penalty thus agreed if it is manifestly excessive or derisory.

## **German Law**

### **German Civil Code**

#### § 340 PROMISE OF A PENALTY FOR FAILURE TO PERFORM

If the debtor has promised a penalty in the event he fails to fulfil the obligation, the creditor may demand the penalty in lieu of fulfillment.

#### § 343 REDUCING THE PENALTY

If the forfeited penalty is disproportionately high, the debtor may obtain a judicial decree reducing it to a reasonable amount. In the determination of reasonableness every legitimate interest of the creditor shall be taken into consideration, not only his economic interest (*Vermögensinteresse*).

## **Chinese Law**

### **Chinese Civil Code**

#### ARTICLE 585

The parties may agree that a party, when breaching the contract, shall pay a certain amount of liquidated damages to the other party according to the circumstances of the breach, and they may also stipulate the method for calculating the amount of damages arising from the breach.

If the agreed liquidated damages are lower than the loss incurred, the parties may apply to the people's court or arbitral institution for an increase; if the agreed liquidated damages are excessively higher than the loss incurred, the parties may apply for an appropriate reduction.

When parties agree on an amount of liquidated damages for delayed performance, the party owing the performance is still bound to perform after paying the liquidated damages.

### **Supreme Court's Judicial Interpretations II of Contract Law (2009)**

#### ARTICLE 28

When parties request an increase in liquidated damage, the increased total amount cannot exceed the actual damage.

#### ARTICLE 29

When reducing liquidated damage, courts shall base the amount of reduction on the actual damage and take into consideration the performance of the contract, faults of the parties and the foreseeable interest. The decision shall be based upon the principles of fairness and good faith.

Liquidated damage amount set by the parties is deemed excessive when it exceeds the 30% of the actual damage.

**XY Renovation Corp. v. Hu Shujuan & Xu Chunhong**, 胡素娟、许春红诉襄阳市房屋租赁修缮公司房地产买卖合同纠纷 (2014) 民申字第227号 (2014) Min Shen Zi No. 227

Plaintiff appellees Hu Shujuan (Hu SJ) and Xu Chunhong (Xu CH) entered into a real estate sales agreement with the defendant appellant Renovation Company (R Corp) for the sale of a house. Upon the signing of the contract, a down payment of RMB 3.01 million yuan was paid in accordance with the agreement. The defendant never tendered the house. The plaintiff sued for breach and asked for the liquidated damages in the amount of RMB 1,722,640 yuan, which was 40 percent of the contract price. The defendant argued that the liquidated damage clause was set too high and should be avoided as obviously unfair.

The Supreme Court held that “R Corp. did not submit any evidence proving that Hu and Xu prevented the performance of the contract. Moreover, the parent company was not privy to the contract. The liquidated damage clause was not set too high as it is comparable to the prevailing rate in the private loan transactions. Consequently, R Corp is liable for liquidated damage as stipulated in the contract.”

### **d. Recovery for Non-Economic Harm**

#### **English Law**

**Jarvis v. Swans Tours Ltd.**, [1973] 1 Q.B. 233

“The defendants, a firm of travel agents, issued a brochure of winter sports holidays for 1969–70 in which one of the holidays was described as a ‘Houseparty in Morlialp’, Switzerland, with ‘special resident host’. The brochure stated that the price of the holiday included the following house-party arrangements: ‘Welcome party on arrival. Afternoon tea and



cake ... Swiss Dinner by candlelight. Fondue-party. Yodler evening ... farewell party.' It also stated that there was a wide variety of ski runs at Morlialp; that ski-packs, i.e. skis, sticks and boots, could be hired there; that the houseparty hotel was chosen by the defendants because of the 'Gemutlichkeit', i.e. geniality, comfort and cosiness, that the hotel owner spoke English, and that the hotel bar would be open several evenings a week. The brochure added, '... you will be in for a great time, when you book this houseparty holiday'. The plaintiff, a solicitor aged about 35, who was employed by a local authority, preferred to take his annual fortnight's holiday in the winter. He looked forward to his holidays and booked them far ahead. In August 1969, on the faith of the representations in the defendants' brochure, he booked with the defendants a 15 day houseparty holiday at Morlialp, with ski-pack, from 20th December 1969 to 3rd January 1970. The total cost of the holiday was £63.45. The plaintiff went on the holiday but he was very disappointed. In the first week the houseparty consisted of only 13 people, and for the whole of the second week the plaintiff was the only person there. There was no welcome party. The ski-runs were some distance away and no full length skis were available except on two days in the second week. The hotel owner did not speak English and in the second week there was no one to whom the plaintiff could talk. The cake for tea was only potato crisps and dry nutcake. There was not much entertainment at night; the yodler evening consisted of a local man in his working clothes singing a few songs very quickly, and the hotel bar was an unoccupied annexe open only on one evening."

Lord Denning. "What is the right way of assessing damages? It has often been said that on a breach of contract damages cannot be given for mental distress. Thus in *Hamlin v Great Northern Railway Co*<sup>1</sup> Pollock CB said that damages cannot be given 'for the disappointment of mind occasioned by the breach of contract.' And in *Hobbs v London & South Western Railway Co*<sup>2</sup> Mellor J said that '... for the mere inconvenience, such as annoyance and loss of temper, or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot recover damages'. The courts in those days only allowed the plaintiff to recover damages if he suffered physical inconvenience, such as, having to walk five miles home, as in *Hobbs's case*<sup>3</sup>; or to live in an overcrowded house: see *Bailey v Bullock*.<sup>4</sup>

I think that those limitations are out of date. In a proper case damages for mental distress can be recovered in contract, just as damages for shock can be recovered in tort. One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment. If the contracting party breaks his contract, damages can be given for the disappointment, the distress, the upset and frustration caused by the breach. I know that it is difficult to assess in terms of money, but it is no more difficult than the assessment which the courts have to make every day in personal injury

1. (1856) 1 H & N 408 at 411.

2. (1875) LR 10 QB 111 at 122, [1874–80] All ER Rep 458 at 463.

3. (1875) LR 10 QB 111, [1874–80] All ER Rep 458.

4. [1950] 2 All ER 1167.

cases for loss of amenities. Take the present case. Mr Jarvis has only a fortnight's holiday in the year. He books it far ahead, and looks forward to it all that time. He ought to be compensated for the loss of it."

### Law in the United States

#### Restatement (Second) of Contracts

##### § 353

Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.

#### **Deutsch v. The Music Company, 6 Ohio Misc. 2d 6 (Mun. Ct. 1983)**

"This is an action for breach of contract. Plaintiffs and defendant entered into a contract on March 27, 1980, whereby defendant was to provide a four-piece band at plaintiffs' wedding [reception on November 8, 1980]. The reception was to be from 8:00 p.m. to midnight. The contract stated 'wage agreed upon \$295.00,' with a deposit of \$65, which plaintiffs paid upon the signing of the contract.

Plaintiffs proceeded with their wedding, and arrived at the reception hall on the night of November 8, 1980, having employed a caterer, a photographer and a soloist to sing with the band. However, the four-piece band failed to arrive at the wedding reception. Plaintiffs made several attempts to contact defendant but were not successful. After much wailing and gnashing of teeth, plaintiffs were able to send a friend to obtain some stereo equipment to provide music, which equipment was set up at about 9:00 p.m. . . .

The court holds that in a case of this type, the out-of-pocket loss, which would be the security deposit, or even perhaps the value of the band's services, where another band could not readily be obtained at the last minute, would not be sufficient to compensate plaintiffs. Plaintiffs are entitled to compensation for their distress, inconvenience, and the diminution in value of their reception. For said damages, the court finds that the compensation should be \$750."

### French Law

#### **Boris Starck, Henri Roland and Laurent Boyer, *Obligations 1. Responsabilité délictuelle* (4th edn., 1991), § 1437**

"The elements of damage which are recoverable are the same in the area of contracts as in the area of torts: material damage (*dommage matériel*), that is to say, the loss that was suffered and the gain that was missed under art. 1149 [now art 1231–2] of the Civil Code; injury to physical integrity and life in contracts that carry with them an obligation of safety; non-economic harm (*dommage moral*, a category which includes pain and suffering) in the different senses of this term; loss of a chance;

harm that occurs because of harm to another (*dommage par ricochet*).”  
[footnotes omitted]

**Tribunal de commerce de la Seine, February 20, 1932, Gaz. Pal. 1932.1.895**

“[P]ursuant to agreements dated in Paris, April 9, 1930, the *Etablissements [J.] Haïck* engaged Mlle. Devillers to shoot a film, ‘The Sweetness of Love,’ with Victor Boucher as a partner – this, in accordance with certain clauses and conditions which were contained in the said agreements;

[R]esisting the claim for the payment of the sum of 15,000 francs and an *astreinte* of 1,000 francs per day of delay until the wall posters and placards are modified to conform to the contract, the *Etablissements J. Haïck* claims that this demand is unjustified; [I]t is appropriate to recall that according to the complaint and facts brought forward by Mlle. Devillers that one of the clauses of the agreements already mentioned provides that this artist would have the female lead and that, in all publications in which Victor Boucher was mentioned, she would have letters two-thirds the size of those with his name;

[I]t appears from the argument and from the documents submitted that from the beginning of the publicity campaign undertaken for ‘The Sweetness of Love,’ the *Etablissements J. Haïck* violated the provision just described . . . [I]ndeed, numerous omissions occurred in the announcements, in the placards, in the programs, and in the posters . . . [W]ith the help of documents, the *Tribunal* was able to determine either that the name of Mlle Devillers did not appear alongside that of Victor Boucher or that it did not appear in letters of the size contractually specified . . .

[B]ecause of the failure of *Etablissements J. Haïck* to perform its obligations, Mlle Devillers suffered commercial disturbance and a certain non-economic harm (*préjudice moral*) for which the *Etablissements J. Haïck* must be held to make compensation . . .

The *Etablissements cinématographiques Jacques Haïck* is adjudged to pay the sum of 15,000 francs definitively and not provisionally as damages, and an *astreinte* is imposed of 100 francs per day of delay for a month so long as the wall posters and placards are not modified as provided in the contract . . . .”

**German Law**

Read §§ 847 and 253 of the German Civil Code below p. 324.

**Oberlandesgericht, Saarbrücken, July 20, 1998, NJW 1998, 2913**

The plaintiff sought assistance with the costs of her action against the defendant for damages for pain and suffering. She had contracted for a room with a fireplace in defendant’s hotel that could accommodate twelve people for the evening of her marriage which was to take place on June 27,

1997. Due to a mistake of the defendant, that room had already been reserved for that night by another party. Because an appropriate alternative was not available, the evening celebration of her marriage did not take place. Because of this “disaster” she “cried for days on end,” “her nerves reached their utter limit,” and she suffered “psychological shock.” She claimed damages for pain and suffering of 3000 DM. The trial court dismissed her request for assistance on the grounds that her action could not succeed as she had suffered no physical harm and could not recover damages for pain and suffering for breach of contract. The *Oberlandesgericht* agreed.

“In the present case, the plaintiff’s claim against the defendant for damages for pain and suffering could not be taken into account according to § 847 of the Civil Code unless the defendant, together with the breach of contract for which he is responsible – the failure to reserve the room – also caused a result that falls within § 823(1) of the Civil Code in the form of an injury to her body or health. But the allegations of the plaintiff do not go far enough to raise such a claim.

We need not consider here whether and to what extent an interference with the psychological state of contracting party through a breach of contract is included within the protective purpose of § 823. Even if that question were to be answered in the affirmative, which would contradict the trial court’s opinion, the plaintiff still would not have sufficiently alleged the factual basis for a claim for damages for pain and suffering.

At the outset, the plaintiff has failed to make a sound claim that the defendant’s breach of contract caused an injury to her body or health. It is true that a person who harms another must answer for the psychological effects of the conduct for which he is responsible, and also that a mere interference caused by this conduct with the psychological state of the party who is affected can constitute an injury to body or health (BGH, NJW 1991, 2337 ...). In a case like the present, however, for the interference with the psychological state of the injured party caused by the conduct of the party responsible for the harm to give rise to liability, the type, intensity and duration of the psychological interference must so clearly surpass the reactions normally present in life to disagreeable events that one can at least compare them to the effects of an illness. (see Palandt/Heinrichs, BGB, before § 249 no.71 ...) That this happened to the plaintiff as a consequence of the defendant’s breach of contract is shown neither by her contention that she ‘cried day after day after this disaster’ and ‘was not able to speak about this event for weeks without crying fits,’ nor by her opinion that her nerves reached their ‘utter limit,’ and she suffered ‘psychological shock,’ an opinion which cannot be understood without more commentary on the facts.

Nevertheless, even if, according to these allegations, the interference with plaintiff’s psychological state had reached the requisite degree of severity, her claim would be defective insofar as the fault of the defendant is concerned, for it must be considered that this fault must encompass, not only the breach of contract constituted by his failure to reserve the room, but also the psychological interference with the plaintiff caused by this

failure which would be the basis for liability. Certainly, in using the appropriate degree of care, the hotel keeper must consider that the result of neglecting to reserve the room requested by the bride for an evening wedding dinner will be a negative psychological reaction, perhaps a serious one. But absent contrary indications, he could not foresee that, under normal circumstances, the type, intensity and duration of this reaction would be so severe as to constitute an injury to body or health."

**Bundesgerichtshof, October 10, 1974, BGHZ 63, 98**

The plaintiff, the owner of a clothing factory, contracted with the defendant, a travel agent, for a package tour for himself, his wife, and their two children for a fixed price of 2,322 DM which would take them to the coast of the Black Sea in Romania for two weeks. He had many complaints about the hotel accommodations, the food, and the opportunities for swimming at the beach. He sued the defendant for damages for 60 percent of the amount he had paid for the package tour as well as a further 1,500 DM as compensation for wasted vacation time.

"The damages sought by the plaintiff for 'wasted vacation time' were refused by the appellate court. In its opinion, the loss of vacation time did not as such constitute a diminution in the value of plaintiff's assets which could be the object of a claim for damages . . .

Here the question is whether the free time spent on vacation, and therefore the *vacation as such* does have an asset value (*Vermögenswert*) so that its loss can constitute material harm when it is spent uselessly ('wasted').

The prevailing, and, indeed, the dominant opinion answers that question in the affirmative taking into account that by current commercial views a vacation is a large extent 'commercialized.' [many citations omitted]

Those who oppose this opinion see in the useless expenditure of vacation time only non-material harm for which compensation could be due only under the particular provisions of § 847 of the Civil Code. [many citations omitted]

The *Bundesgerichtshof* has not yet determined whether a vacation has an asset value. Yet a decision pointing in this direction is found in the 'sea trip' case (BGH NJW 1956, 1234, 1235) in which damages for the interference with the enjoyment of a trip were granted because a traveller's luggage was not made available to him. In this opinion, it was considered decisive that the 'purchased enjoyment of a vacation' could not be fully realized without the luggage.

The Senate follows the dominant opinion, according to which the vacation as such possesses an asset value . . . "

**Note.** Results in cases like this one eventually received legislative sanction in what is now § 651f(2) of the German Civil Code: "If a trip is frustrated or seriously disrupted, the traveller can also recover an appropriate compensation in money for uselessly expended vacation time."

## Chinese Law

### Chinese Civil Code

#### ARTICLE 996

Where one party's breach of contract caused harm to the other party's personality rights and caused significant mental harm, the victim's claim for breach of contract does not preclude his claim for mental distress.

### e. Recovery for Unforeseeable Harm

#### i. Origins

One change that the Emperor Justinian made in his compilation of Roman law was to place a limit on the damages that a party could recover in contract:

In all cases which have a certain quantity or nature . . . damages are not to exceed twice the quantity; however, in other cases which appear to be uncertain judges are to require that the damages which was truly incurred be paid for.<sup>1</sup>

This rule was followed where Roman law was adopted in medieval and early modern Europe. There was much dispute about what it meant to speak of "cases which have a certain quantity or nature" or "cases which appear to be uncertain." As Reinhard Zimmermann notes, "[g]enerations of lawyers have been mystified by the terms of this poorly drafted enactment."<sup>2</sup>

In the sixteenth century, the French jurist Molinaeus (or, in French, du Moulin) thought he had discovered the rationale behind the rule:

The rationale on which all the law is based is the dislike of enormity and so the particular rationale of the limitation in the cases of what is certain is that most likely it was not foreseen or thought that greater damage would be suffered or that there was a risk beyond the principal object than the principal object itself.<sup>3</sup>

He noted that it would be equally equitable to limit the damages recoverable in the cases that concern what is uncertain.

As Zimmermann has noted, in the eighteenth century "Pothier generalized this idea and detached it from the specific provisions" of the Roman text. He said that "the person who owes a performance is only liable for the damages that one could have foreseen at the time of the contract that the party owed a performance would suffer."<sup>4</sup>

1. C. 7.47.1.

2. Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990), 828.

3. Carolus Molinaeus, *Tractatus de eo quod interest* (1574), no. 60.

4. Robert Pothier, *Traité des obligations*, no. 160, in *Oeuvres de Pothier* 2 (Bugnet, ed., 2nd edn., 1861), 497.



For instance, suppose I sell a person a horse which I am obliged to deliver in a certain time, and I cannot deliver it accordingly: if in the meantime horses have increased in price, whatever the purchaser is obliged to pay more than he would have given for mine, in order to procure another of the like quality, is a damage for which I am obliged to indemnify him, because it is a damage . . . which only relates to the thing that was the object of the contract, and which I might have foreseen; the price of horses like that of all other things being subject to variation. But if this purchaser was a canon, who for want of having the horse that I had engaged to deliver to him, and not having been enabled to get another, was prevented from arriving at the place of his benefice in time to be entitled to his revenue, I should not be liable for the loss which he sustained thereby, although it was occasioned by the non-performance of my obligation; for this is a damage which is foreign to the obligation, which was not contemplated at the time of the contract, and to which it cannot be supposed that I had any intention to submit . . . .<sup>5</sup>

He recognized one exception: full damages could be recovered if the performance was due to wilful misconduct (*dol*).

## ii. Modern Law

In reading the following cases, consider when the courts are chiefly concerned with whether a loss is foreseeable or when they are concerned instead or in addition, as in Roman law, with the disproportion between the loss suffered and the contract price.

### French Law

#### French Civil Code

##### ARTICLE 1231–3

(modifying Article 1150 of the original Code)

A debtor is bound only to damages which were either foreseen or which could have been foreseen at the time of conclusion of the contract, except where non-performance was due to a gross or dishonest fault.

**Note.** Article 1231–3 modified Article 1150 of the original Code by providing an exception to the requirement that damages be foreseen or foreseeable when non-performance was due “to a gross or dishonest fault.” Article 1150 provided that the exception must be due to “willful misconduct” (*dol*).

#### Cour de cassation, 1<sup>e</sup> ch. civ., May 11, 1982, Gaz. Pal. 1982.2.612

“[A]ccording to this text [art. 1150, now art. 1231–3] one who owes a contractual obligation is only liable for the damages which were foreseen or

5. *Ibid.* no. 159 (W. Evans trans., 1806).



could have been foreseen at the time of the contract as long as his nonperformance was not due to wilful misconduct ...

[B]y a decision of 21 April 1978 ... M. Roche, a roofing and plumbing contractor, was held contractually responsible on account of his negligence for a fire caused by the use of a blowtorch which partially destroyed a chateau belonging to the married couple Galliaud whose roof Roche was engaged in repairing ...

[T]he decision challenged here, rendered on 1 October 1980 ... required M. Roche to pay various indemnities including an amount of 60,000 francs representing the interest on a loan that the proprietor contracted to undertake the initial expenses of putting the building that burned into shape and a sum of 70,000 francs for loss of rent of the premises on the first floor of the chateau ...

[I]n requiring M. Roche to pay damages of these two kinds, even though no wilful misconduct or gross negligence had been imputed to him, on the grounds that his failure to perform a contractual obligation coincided with a fault in tort in that it constituted culpable negligence, and that therefore he was obligated to repair even the harm that was not foreseen at the time of the contract, the *Cour d'appel* misunderstood the principle that the victim of a harm for which the perpetrator is contractually responsible cannot hold the perpetrator to the rules of delictual liability ..."

### **Cour de cassation, ch. civ., December 29, 1913, D.P. 1916.1.117**

"[I]n conformity with art. 1150 [now art. 1231–3], and except in case of wilful misconduct, a carrier is only liable for damages which were foreseen or which could have been foreseen at the time of the contract ... [N]o provision in the list of changes and fees imposes an obligation on passengers to declare the content of the baggage which accompanies them, and as a result, railroad companies must foresee that certain travelers will be carrying objects of a more or less considerable value in their baggage ... [I]n any event, in case of loss and of argument over the amount of damages, it pertains to the courts to limit the liability of these companies by the principles just mentioned according to the circumstances of each case, taking into account the quantity and the value of the objects a traveler would normally bring with him, having regard to his profession, his financial condition, the object of the trip and the price of a ticket ...

[A]ccording to the decision under appeal, on May 23, 1908, at the railway station at Cannes, Rouquier checked, as baggage to accompany him to his destination at Courthézon (Vauclussse), a box weighing 30 kg [66 pounds] containing three cans of essence of neroli worth 725 francs per kilogram ... [T]his box, left in the station where the train arrived, was stolen on the night of May 29–30 ... [I]t was discovered the next day but it was missing 5 kg 650 g. of the essence it had contained ... [A]s compensation for the damage he suffered, Rouquier demanded from the Paris-Lyon-Mediterranean Railroad Co. a payment of 4096 francs 25 centimes, reflecting the price of the essence, and 2000 francs of [other] damages ... [T]he

Company responded with an offer of compensation of 100 francs, maintaining that there was no way it could foresee that merchandise worth 16,000 francs was contained in a box checked as ordinary baggage which bore no indication of the sort that would enlighten the transporter as to the value of its contents, and which had been abandoned in the baggage claim of a tiny railway station for six days without any notice given to the employees . . .

[N]evertheless, the *Cour d'appel* of Nîmes, affirming the decision of the *Tribunal de commerce* of Avignon, held that compensation must be made for the entire sum demanded for the value of the essence that was lost and 100 francs additional damages, declaring that, as *force majeure* was not present in this case, the Company could not invoke any legal limitation to its harm, 'art. 1150 of the Civil Code having in view only the damages due in the event that delivery is delayed, but not dealing with compensation for a box for which the traveler has established the value' . . . [I]n ruling in this way, according to a distinction which does not belong to the article . . . the decision violated [the Civil Code] . . ."

#### **Cour de cassation, ch. civ., July 7, 1926, D.P. 1927.1.119**

When plaintiff's merchandise was shipped, its value was declared to be 475 francs. It was lost. Plaintiffs sued for 16,685 francs which, they claimed, was 70 percent of its true value. The court below awarded 475 francs. The *Cour de cassation* affirmed. "[A]ccording to the appeal (*pourvoi*), in all cases, the compensation must be in accord with the real value, and not the presumed value of the merchandise . . . [I]n effect, within the meaning of art. 1150 [now art. 1231–3], the party who does not fulfil his obligation is held, if he was in good faith, to the integral reparation of the harm as long as the cause of the harm could have been foreseen . . . but . . . this text does not make any reference to the foreseeability of the cause of the harm, and, far from charging a party who acted in good faith with damages which surpass in amount what he could have foreseen, it explicitly declares that except in cases of wilful misconduct, that party is liable only for the damages which could have been foreseen at the time of the contract."

#### **English Law**

#### **Hadley v. Baxendale, (1854) 9 Ex. 341, 156 Eng. Rep. 145**

"At the trial before Crompton, J., at the last Gloucester Assizes, it appeared that the plaintiffs carried on an extensive business as millers at Gloucester; and that, on the 11th of May, their mill was stopped by a breakage of the crank shaft by which the mill was worked. The steam-engine was manufactured by Messrs. Joyce & Co., the engineers, at Greenwich, and it became necessary to send the shaft as a pattern for a new one to Greenwich. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who are the well-known carriers trading under the name of Pickford & Co., for the purpose of having the shaft carried to Greenwich. The plaintiffs'

servant told the clerk that the mill was stopped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken, the answer was, that if it was sent up by twelve o'clock any day, it would be delivered at Greenwich on the following day. On the following day the shaft was taken by the defendants before noon, for the purpose of being conveyed to Greenwich, and the sum of £2, 4s. was paid for its carriage for the whole distance; at the same time the defendants' clerk was told that a special entry, if required, should be made to hasten its delivery. The delivery of the shaft at Greenwich was delayed by some neglect; and the consequence was, that the plaintiffs did not receive the new shaft for several days after they would otherwise have done and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received . . . ." In a divided opinion, the court held that the plaintiff could not recover lost profits.

Parke B. [speaking to counsel]. "The sensible rule appears to be that which has been laid down in France, and which is declared in their Code Civil, liv, iii, tit. iii. ss. 1149, 1150, 1151, and which is thus translated in Sedgwick [on Damages, p. 67]: 'The damages due to the creditor consist in general of the loss that he has sustained, and the profit which he has been prevented from acquiring, subject to the modifications hereinafter contained. The debtor is only liable for the damages foreseen, or which might have been foreseen, at the time of the execution of the contract, when it is not owing to his fraud that the agreement has been violated. Even in the case of non-performance of the contract, resulting from the fraud of the debtor, the damages only comprise so much of the loss sustained by the creditor, and so much of the profit which he has been prevented from acquiring, as directly and immediately results from the non-performance of the contract.' If that rule is to be adopted, there was ample evidence in the present case of the defendants' knowledge of such a state of things as would necessarily result in the damage the plaintiffs suffered through the defendants' default . . . ."

Alderson, B. "Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the

great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said, that other cases such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognisant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances shew reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow."

**Koufos v. C. Czarnikow, Ltd., [The Heron II] [1969] A.C. 350 (H.L. 1967)**

Lord Reid. "By charter party of Oct. 15, 1960, the respondents chartered the appellant's vessel, *Heron II*, to proceed to Constanza, there to load a cargo of three thousand tons of sugar; and to carry it to Basrah, or, in the charterers' option, to Jeddah. The vessel left Constanza on Nov. 1. The option was not exercised and the vessel arrived at Basrah on Dec. 2. The umpire has found that 'a reasonably accurate prediction of the length of the voyage was twenty days.' But the vessel had in breach of contract made deviations which caused a delay of nine days.

It was the intention of the respondent charterers to sell the sugar 'promptly after arrival at Basrah and after inspection by merchants.' The appellant shipowner did not know this, but he was aware of the fact that there was a market for sugar at Basrah. The sugar was in fact sold at Basrah in lots between Dec. 12 and 22 but shortly before that time the market price had fallen partly by reason of the arrival of another cargo of sugar. It was found by the umpire that if there had not been this delay of

nine days the sugar would have fetched £32 10s. per ton. The actual price realized was only £31 2s.9d. per ton. The charterers claim that they are entitled to recover the difference as damage for breach of contract. The shipowner admits that he is liable to pay interest for nine days on the value of the sugar and [plaintiff's cable] expenses but denies that fall in market value can be taken into account in assessing damages in this case . . .

There is no finding that the charterers had in mind any particular date as to the likely date of arrival at Basrah or that they had any knowledge or expectation that in late November or December there would be a rising or a falling market. The shipowner was given no information about these matters by the charterers. He did not know what the charterers intended to do with the sugar. But he knew there was a market in sugar at Basrah, and it appears to me that, if he had thought about the matter, he must have realized that at least it was not unlikely that the sugar would be sold in the market at market price on arrival. And he must be held to have known that in any ordinary market prices are apt to fluctuate from day to day: but he had no reason to suppose it more probable that during the relevant period such fluctuation would be downwards rather than upwards – it was an even chance that the fluctuation would be downwards.” [Held: that the charterers can recover damages for the fall in market value.]

### **Law in the United States**

#### **Restatement (Second) of Contracts**

##### **§ 351. UNFORESEEABILITY AND RELATED LIMITATIONS ON DAMAGES**

- (1). Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
- (2). Loss may be foreseeable as a probable result of a breach because it follows from the breach.
  - (a). in the ordinary course of events, or
  - (b). as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.
- (3). A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

*Illustrations 17.* A, a private trucker, contracts with B to deliver to B's factory a machine that has just been repaired and without which B's factory, as A knows, cannot reopen. Delivery is delayed because A's truck breaks down. In an action by B against A for breach of contract the court may, after taking into consideration such factors as the absence of an elaborate written contract and the extreme disproportion between B's loss of profits during the delay and the price of the trucker's services, exclude recovery for loss of profits.

18. A, a retail hardware dealer, contracts to sell B an inexpensive lighting attachment, which, as A knows, B needs in order to use his tractor at night on his farm. A is delayed in obtaining the attachment and, since no substitute is available, B is unable to use the tractor at night during the delay. In an action by B against A for breach of contract, the court may, after taking into consideration such factors as the absence of an elaborate written contract and the extreme disproportion between B's loss of profits during the delay and the price of the attachment, exclude recovery for loss of profits.

### **Chinese Law**

#### **Chinese Civil Code**

##### ARTICLE 584

Where a party fails to perform his contractual obligations or where his performance of the contractual obligations is not in conformity with the agreement, thereby causing a loss to the other party, the amount of damages shall be equal to the loss sustained as a result of the breach, including the benefits that could have been obtained after the performance of the contract, but shall not exceed the loss that the breaching party foresaw or ought to have foreseen at the time of the conclusion of the contract as a possible consequence of the breach of contract. (previously Contract Law, Article 113)

### **The Draft Common Frame of Reference**

##### ARTICLE III. 3:703: FORESEEABILITY

The debtor in an obligation which arises from a contract or other juridical act is liable only for loss which the debtor foresaw or could reasonably be expected to have foreseen at the time when the obligation was incurred as a likely result of the non-performance, unless the non-performance was intentional, reckless or grossly negligent.

### **The Unidroit Principles of International Commercial Contracts**

##### ARTICLE 7.4.4 FORESEEABILITY OF HARM

The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance.

##### COMMENT

The concept of foreseeability must be clarified since the solution contained in the Principles does not correspond to certain national systems which allow compensation even for harm which is unforeseeable when the non-performance is due to wilful misconduct or gross negligence. Since the



present rule does not provide for such an exception, a narrow interpretation of the concept of foreseeability is called for. Foreseeability relates to the nature or type of the harm but not to its extent unless the extent is such as to transform the harm into one of a different kind. In any event, foreseeability is a flexible concept which leaves a wide measure of discretion to the judge.

What was foreseeable is to be determined by reference to the time of the conclusion of the contract and to the non-performing party itself (including its servants or agents), and the test is what a normally diligent person could reasonably have foreseen as the consequences of non-performance in the ordinary course of things and the particular circumstances of the contract, such as the information supplied by the parties of their previous transactions.

### **Illustrations**

1. A cleaning company orders a machine which is delivered five months late. The manufacturer is obliged to compensate the company for lost profit caused by the delay in delivery as it could have foreseen that the machine was intended for immediate use. On the other hand the harm does not include the loss of a valuable government contract that could have been concluded if the machine had been delivered on time since that kind of harm was not foreseeable.
2. A, a bank, usually employs the services of a security firm for the conveyance of bags containing coins to its branches. Without informing the security firm, A sends a consignment of bags containing new coins for collectors worth fifty times the value of previous consignments. The bags are stolen in a hold-up. A can only recover compensation corresponding to the value of the normal consignments as this was the only kind of harm that could have been foreseen and the value of the items lost was such as to transform the harm into one of another kind.

## **German Law**

### **German Civil Code**

#### **§ 254. CONTRIBUTORY FAULT**

If the fault of the injured party contributed to causing the injury, the obligation to compensate the injured party and the extent of the obligation depend upon the circumstances, and especially on the extent to which the injury was caused by one party or the other.

This provision also applies if the fault of the injured party consisted of an omission to call the attention of the party owing performance to the danger of an unusually serious injury of which that party neither knew nor should have known, or of an omission to avert or mitigate the injury.



**Note.** Paragraph 2 of § 254 was added, so to speak, at the last minute when the draft was before the legislature. Previous drafts had contained provisions like the following:

The liability for failure to perform of the person owing performance does not extend to compensation for harm the occurrence of which lay beyond the realm of probability given the awareness of the circumstances which that person had or must have had.<sup>1</sup>

The change was made because this provision appeared to be too restrictive, and yet it was felt that some limitation was necessary.<sup>2</sup>

### **Oberlandesgericht, Hamm, February 28, 1989, NJW 1989, 2066**

“The plaintiff entrusted the defendant with the task of translating a brochure concerning parts that would improve the suspension of motorcycles into the Dutch, French, English, Spanish and Italian languages. Claiming that the printed brochures were unusable due to faulty translation, the plaintiff seeks damages in the amount of 21,398.15 DM ...

There was fault on the part of the plaintiff ... within the meaning of § 254(2) sentence 1 of the Civil Code because, in violation of its duty, the plaintiff failed to inform the defendant of the danger of an unusually severe harm as a consequence of the error in translation. After all, the damage that threatened, and which occurred, was forty times as large as the fee for translation. Such a relationship between the payment for translation on the one hand and the consequences of mistakes on the other lies outside the normal course of experience in commercial translations.

According to the evidence presented ... the defendant neither actually knew nor should have known of the possibility that these unusually high damages would occur. Such a state of knowledge does not follow from the use of the word ‘brochure’ in their contract. Certainly, the defendant must have inferred that use would be made of its translation. But, on the other hand, it need not have expected that the plaintiff would have the translation immediately printed in full for its customers in the Netherlands without any proofreading.”

### **Bundesgerichtshof, January 29, 1969, NJW 1969, 789**

Plaintiff was a jewellery salesman who stayed in defendant’s hotel. He gave his car key to the night porter so that his car could be left in a garage, not owned by the hotel, but which, by arrangement with its owner, the defendant used to provide parking for his guests. A valuable collection of jewellery, which plaintiff had left locked in his trunk, was stolen during the

1. § 218 in *Protokolle der Kommission für die zweite Lesung des Entwurfs des Bürgerlichen Gesetzbuchs* (1897), 292.

2. “Antrag von Enneccerus in der XII. Kommission” no. 134 in *Die Beratung des*

*Bürgerlichen Gesetzbuchs Recht der Schuldverhältnisse* 1 (H.H. Jakobs and W. Schubert, eds., 1978), 117–18.

night. The trunk showed no signs of damage. Plaintiff sued for the value of jewellery.

“The decision of the present case . . . depends on whether the defendant can assist himself by pointing to a fault [the plaintiff] within the meaning of § 254 BGB and so avoid, in whole or in part, liability for damages . . .

It must be considered, in the first place, that [the plaintiff] left his collection in the trunk of his car without informing the porter or any other personnel of relevance to the defendant of its value and hence the danger of an abnormally high loss (§ 254 BGB par. 2 sentence 1).”

[The court remanded for a finding on contributory fault.]

**Wolfgang Grunsky, *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (H. Heinrichs, ed., 3rd edn., 1994), § 254 nos. 40–1**

“The duty to warn of the injured party presupposes that the injurer neither knew nor must have known about the danger. If the injurer and the injured had equally good possibilities of knowing, then a warning need not be given (BGH VersR 1963, 14). If through negligence neither the injurer nor the injured party know of the danger, then the injurer bears the risk. The harm is not to be divided as in § 254 . . .

The duty to warn is supposed to give the injured party the opportunity to take counter measures. If such measures are no longer possible, then the duty to warn disappears.”

# TORT LAW

## I. THE SCOPE OF THE RIGHTS PROTECTED

### 1. Introduction: The Structure of Tort Law

#### a. Civil Law

##### i. The Civil Codes

In modern civil codes, much of tort law depends on short, general provisions that say that a person is liable for harm (or certain harms) that he causes through his fault.

#### French Civil Code

##### ARTICLE 1240

(formerly Article 1382)

Any act of a person which causes harm to another obligates the person through whose fault the harm (*dommage*) occurred to make compensation for it.

##### ARTICLE 1241

(formerly Article 1383)

A person is liable for the harm that he causes not only by his acts but by his negligence or imprudence.

French commentators explain (correctly) that Article 1382 (now Article 1240) was meant to govern harm caused intentionally. Taken together, then, these provisions mean that the defendant is liable if he intentionally or negligently causes “harm” to the plaintiff.

Nothing in the French Civil Code or in its drafting history explains what is supposed to count as “harm.” French courts have had to work that out for themselves.

The analogous provision of the German Civil Code is a bit different.

#### German Civil Code

##### § 823(1) DUTY TO COMPENSATE FOR HARM

A person who intentionally or negligently unlawfully (*widerrechtlich*) injures the life, body, health, freedom, property or similar right (*sonstiges Recht*) of another is bound to compensate him for any damages that thereby occurs.

The word “unlawfully” is used to make it clear that a person may intentionally or negligently harm another and still not be liable because he is not at fault: for example, if he harms another in self defense. Of course, in that case he is not liable in France either, but the point is not explicit in the French provisions.

Moreover, according to § 823(1), a person is not liable for any harm to another. He is liable for harm to life, body, health, freedom (meaning freedom of movement), property or a “similar right.” One reason for the provision is that the drafters believed that there were certain harms for which the plaintiff should not recover. In particular, they believed that he should not recover for harm to privacy or dignity, or for an economic loss unaccompanied by harm to person or property. The drafters also wanted to say something definite about the harms for which the plaintiff could recover. Nevertheless, they realized that they could not make an exhaustive list of such harms. So they added the phrase “or a similar right.” That phrase allows German courts to protect additional rights which they regard as “similar.”

The drafters also extended liability in other ways. They added a second paragraph to § 823 to deal with the violation of rights created by particular statutes.

#### § 823(2) DUTY TO COMPENSATE FOR HARM

The same obligation rests on a person who infringes a statute intended for the protection of others. If, according to the provisions of the statute, its infringement is possible even without fault, the duty to make compensation arises only in the event of fault.

The drafters also provided that in the case of intentional misconduct, the plaintiff could recover for “harm” he suffered even if the rights described in § 823 had not been violated.

#### § 826 INTENTIONAL HARM CONTRARY TO GOOD MORALS

A person who intentionally causes harm to another in a manner contrary to good morals (*gute Sitten*) is bound to compensate him for the harm.

## ii. From Roman Law to Modern Code Provisions

The French Civil Code was enacted in 1804. The German Civil Code came into force in 1900. Most other continental countries have enacted civil codes as well. Before the law was codified, the law in force in much of Germany and France and most of continental Europe was Roman law. Nevertheless, even where Roman law was in force, the law of delict or tort was understood rather differently by the eighteenth century than it had been by the Roman jurists.

The Roman jurists themselves had little to say about torts in general, or, for that matter, about contracts in general. They had a law of particular torts and particular contracts, each with its own rules. Gaius was the first Roman jurist to distinguish two general classes of obligations, *delictus* and *contractus*, tort and contract.<sup>1</sup> But he did not describe the general principles of tort or contract law. He discussed particular torts.

Two of these torts became the basis for later continental law. One was called an action for *iniuria*. It could be brought for many different kinds of

1. G. Inst. 3.88.

offensive behavior such as insulting someone by striking him. The plaintiff could recover for a blow. He could also recover if he “be not in fact struck but hands are raised against him and he is frequently afraid of a beating, though not in fact struck . . . .”<sup>2</sup> He could recover if the defendant entered his house without permission.<sup>3</sup> He could also recover in a variety of instances in which he was insulted or his reputation was adversely affected.

For example, he could recover if someone composed or recited a song attacking him.<sup>4</sup> He could recover if someone attacked his reputation in a petition presented to the emperor.<sup>5</sup> He could recover if someone beat his slave.<sup>6</sup> He could recover if the defendant assembled people at his house to raise a loud and offensive clamor.<sup>7</sup>

The defendant was also liable for *iniuria* if he “accosted” a woman or abducted or removed her attendant – a companion every woman was supposed to have when she appeared in public. According to the jurist Ulpian, “To accost is with smooth words to make an attempt upon another’s virtue.”<sup>8</sup> Defendant was also liable for following a woman “assiduously.”<sup>9</sup> Also, “one who uses base language does not make an attempt upon virtue, but he is liable to the action for *iniuria*.”<sup>10</sup>

From the Middle Ages through the eighteenth century, the action was generalized so that it provided relief for almost any act wrongfully impairing another’s dignity or reputation. Reinhard Zimmermann gives some examples from eighteenth-century Germany:

It could be injurious to taunt his person with his natural impediment by calling him a cripple, or a hunchback. To refer to someone, ironically, as a “bonus patiens vir” (and thus suggesting that he was a cuckold), to state emphatically “ego saltem scortator non sum” (and thus insinuate that a particular other person is a fornicator), to use obscene language, particularly in the presence of a virgo, to address a clergyman “du pfaff,” or to use the familiar “du” when talking German to persona honorabilis. These are all cases of verbal injuries. Pulling faces, putting out one’s tongue at another or kissing a woman against her will are examples of *iniuriae reales*.<sup>11</sup>

Another Roman tort was an action under the *lex Aquilia*. It is the ancestor of provisions like Articles 1240–1 of the French Civil Code and § 823(1) of the German Civil Code. Today, French and German lawyers will sometimes say that these provisions create an “Aquilian” liability. There were two basic requirements for an action under the *lex Aquilia*. First, the defendant had to be at fault to be liable. That requirement will be described below when we deal with fault, but, in

2. Dig. 47.10.15.1.

3. Dig. 47.2.21.7.

4. Dig. 47.10.15.27.

5. Dig. 47.10.15.29.

6. Dig. 47.10.15.34.

7. Dig. 47.10.15.2.

8. Dig. 47.10.15.20.

9. Dig. 47.10.15.22.

10. Dig. 47.10.15.21.

11. Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990), 1065–66 [footnotes omitted].

general, fault meant that he caused harm either intentionally or negligently, as it does in the modern codes.

Second, the plaintiff could recover only if he suffered certain types of harm. One Roman text said that the plaintiff had an action even if “the harm was not done physically nor an object physically injured.”<sup>12</sup> But in almost all the Roman examples, the plaintiff has lost the use of a physical object even if it was not physically injured: for example, he could recover for the loss of a cup whether it was smashed or thrown into a river where he could not get it back. The plaintiff could not recover if he himself was physically injured.

The closest the Romans came to allowing such an action was to let him recover if his son was injured while still under his authority. Here are two (almost the only two) texts that indicate that he can. Both are from the jurist Ulpian.

Julian also puts his case: A shoemaker, he says, struck with a last at the neck of a boy who was freeborn and whom he was teaching because he had done badly what he had been shown and so knocked out his eye. On these facts, Julian, says that the action for *iniuria* does not lie because he struck him not with the intent to insult but in order to correct and teach him. He wonders whether there is an action for breach of the contract for his services as a teacher, since a teacher is only permitted to punish lightly, but I have no doubt that an action can be brought against him under the *lex Aquilia*.<sup>13</sup>

If a man kills another in wrestling or boxing, provided he kills him in a public match, the *lex Aquilia* does not apply because the harm appears to have been done in the cause of glory and virtue and not for the sake of injury . . . . This applies when a son under authority has been hurt.<sup>14</sup>

Beginning in the Middle Ages, the Roman texts were interpreted to allow recovery for many other types of harm although the jurists never arrived at a clear rule. The Glossators (the jurists who wrote from about 1100 until the mid-thirteenth century) said that the plaintiff could recover if he was physically injured, citing the first of the two texts just quoted. Citing the second text, the jurist Azo (who died about 1210) said that there could be recovery if a person was killed, whether or not he was a son in authority. The plaintiffs in such an action would be his heirs and relatives. By the seventeenth century it was widely accepted that his wife and children could recover for loss of support. By that time, it has also become accepted that the plaintiff could recover for pain and suffering.<sup>15</sup> Whether he could recover for economic harm that was not accompanied by physical loss was

12. Inst. 4.3.16.

13. Dig. 9.2.5.3.

14. Dig. 9.2.7.4.

15. Zimmermann, *The Law of Obligations*, 1024–6.

less clear, but jurists sometimes gave examples in which he did. For example, the medieval jurist Durandus said that the plaintiff could recover if the defendant put dung in the street in front of his house, and he therefore had to pay a fine imposed by statute.<sup>16</sup> One of the greatest medieval jurists, Baldus degli Ubaldi, said that the plaintiff could recover against his secretary who revealed his secrets.<sup>17</sup> In the eighteenth century, Lauterbach and Brunnemann said that a client could recover from an advocate who harmed him through lack of skill.<sup>18</sup> Thus, one change that had taken place by the time that modern civil codes were enacted is that a remedy was given under the *lex Aquilia* for many more kinds of harm than in Roman times.

Another change was that jurists had begun to theorize about the general principles of tort law. The medieval jurists were primarily interested in interpreting the Roman texts in a way that made sense to them. They were not trying to formulate a general principle or explain philosophically where it came from. Among jurists, that task began with the work of the so-called “natural law schools” which flourished from the sixteenth through the eighteenth centuries. The first of these schools (sixteenth and early seventeenth century) was that of the “late scholastics” or “Spanish natural law school” whose leading members were Domenico Soto, Luis de Molina, and Leonard Lessius. The second was the northern natural law school founded by Hugo Grotius and Samuel Pufendorf in the sixteenth century. It influenced the French jurists Jean Domat and Robert Pothier, who in turn influenced the drafters of the French Civil Code.

The late scholastics tried to explain Roman law with principles drawn from their intellectual heroes, the Greek philosopher Aristotle and the medieval philosopher and theologian Thomas Aquinas. They identified contract and tort with Aristotle’s concepts of voluntary and involuntary commutative justice. For Aristotle, while distributive justice guarantees each citizen a fair share of whatever resources were to be distributed, commutative justice preserves the share of each citizen. When citizens exchange resources voluntarily, commutative justice requires that they do so at a just price, a price that preserves their share. If one citizen is involuntarily deprived of resources by another, commutative justice requires the person who did so to restore his victim’s share of resources.<sup>19</sup> This distinction not only resembles the one we draw between contract and

16. G. Durandus, *Speculum iuris* (1574), lib. iv, par. iv, De iniuriis et damno dato, § 2 (sequitur) no. 15.

17. Baldus de Ubaldi, *Commentaria Corpus iuris civilis* (1577), to Dig. 9.2.41 (vulg. 9.2.42) pr. in fine. In the sixteenth century, Zasius gave the same opinion in the case of the secretary, citing Baldus. Ulrich Zasius, *Commentaria seu Lecturas eiusdem in titulos primae Pandectarum ad Dig. 9.2 no. 1*, in *Opera omnia* vol. 1 (1550) (repr. Scientia Verlag, 1966).

18. Wolfgang Lauterbach, *Collegium theorico-practici* (1793), to Dig. 9.2 no. xv; Johann Brunnemann, *Commentarius in quinquaginta libros Pandectarum* (1762), to Dig. 9.2.8 no. 5. Horst Kaufmann has found many other examples from the practice of early modern times. H. Kaufmann, *Rezeption und Usus Modernus der Actio Legis Aquiliae* (1958), 46–56.

19. *Nicomachean Ethics* V.ii 1130<sup>b</sup>–1131<sup>a</sup>.



tort but may have been its lineal ancestor. Our distinction goes back to Gaius. Modern scholars think that he took it from Aristotle.<sup>20</sup>

Having taken that step, the late scholastics concluded that the distinctions between *iniuria*, the *lex Aquilia*, and the other particular Roman torts was a mere matter of Roman positive law. In principle (or as they put it, as a matter of natural law), the defendant should be liable whenever, through his own fault, he deprived the plaintiff of anything that belonged to him as a matter of justice.<sup>21</sup> They were not very specific about what belonged to a person as a matter of justice. Nevertheless, they thought that this principle explained not only recovery under the *lex Aquilia* but in the action for *iniuria* as well. In the action for *iniuria*, the plaintiff recovered for insult which deprived him of his reputation or his dignity.

Grotius borrowed many of his conclusions from the late scholastics, and this was an instance. In discussing tort law, he stated the same general principle but he also is not very specific about it:

Enough has been said about contracts. We come to what is due by the law of nature because of a wrong.

By a wrong, we mean every fault, whether of commission or of omission, which is in conflict with what men ought to do, either generally or because of some special characteristic. From such a fault, if damage is caused, an obligation arises by the law of nature, namely, that the damage should be made good.

Damage, *damnum* (perhaps from *demo*) is when a man has less than what is his, whether it be his by mere nature or by some human act in addition such as ownership, pact, law. Things which a man may regard as his by nature are life, not indeed to throw away but to keep, his body, limbs, fame, honor, his own acts. The previous part of our treatise has shown how each man by property right and by agreements possesses his own not only with respect to property but also with respect to the acts of others . . .<sup>22</sup>

This text had an enormous influence on the history of tort law. It was followed by many jurists including the eighteenth-century French jurist Robert Pothier, who influenced the drafters of the French Civil Code. Pothier said:

A delict is an act by which a person through intent or malice causes a damage or injury to another.

A quasi-delict is an act by which a person without malice but by inexcusable imprudence causes an injury to another.<sup>23</sup>

20. Zimmermann, *Law of Obligations*, 10–11; M. Kaser, *Das Römische Privatrecht* 1 (2nd edn., 1971), 522; A. Honoré, *Gaius* (1962), 100; H. Coing, “Zum Einfluß der Philosophie des Aristoteles auf die Entwicklung des römischen Rechts,” *Zeitschrift der Savigny Stiftung für Rechtsgeschichte*, Rom. Abt. 69 (1952), 24, 37–8.

21. For examples, Lessius said that by a “thing” (*res*) taken from the owner he understands not only an object such as a

horse, clothes or money but “what is owed as a matter of justice . . . such as a legacy left another or something which has been sold but which I still have.” Leonardus Lessius, *De iustitia et iure, ceterisque virtutibus cardinalis libri quatuor* (1628), lib. 2, cap. 7, dub. 5, no. 19.

22. Hugo Grotius, *De iure belli ac pacis libri tres* (1646), II.xvii.1–2.

23. Robert Pothier, *Traité des obligations* (1761), nos. 116, 118.

Pothier, unlike Grotius, did not try to enumerate the different types of harm for which one could recover. When the French drafters wrote what are now Articles 1240–1, they paraphrased Pothier. As a result, French courts today decide whether a plaintiff can recover without any guidance from the Code as to what constitutes a “harm.”

The stage was then set for the German jurists to be concerned about the vagueness of the term harm, and to try to give it a more definite content in the ways we have seen.

## **b. Common Law**

### **i. A List of Torts**

Common lawyers do not decide whether the plaintiff can recover by asking whether he suffered “harm” or whether the defendant violated a right which is “similar” to certain enumerated rights. They ask whether the defendant committed a particular tort for which common law courts give relief.

One of these torts is “negligence.” The defendant is liable if he negligently harmed the person or property of the plaintiff. “Negligence” was recognized as a distinct tort only in the nineteenth century. Before that, the defendant would sue in “trespass” if he had been injured in a straightforward manner: for example, if the defendant had struck him or carried off his goods. For injuries done in a less straightforward way (as some put it, for injuries done “indirectly” rather than “directly”), the plaintiff had to bring an action called “trespass on the case.” Instead of just claiming that the defendant struck him or came on his land, he alleged particular facts that entitled him to relief.

Trespass was actually a family of actions which today are recognized as particular torts. Americans usually describe them as “intentional torts” and say that to be liable, the defendant must have acted intentionally. If he acted negligently, he should be sued in “negligence.” In England, that view was taken by Lord Denning who said that the distinction between actions in trespass for direct injury and in trespass on the case for indirect injury have been superceded by one in trespass for intentional and negligent injury for negligence.<sup>1</sup> The House of Lords has not yet said whether it agrees, and English writers have different opinions. Some think that the defendant is liable in trespass if the contact was “direct” whether he acted intentionally or negligently.<sup>2</sup> The English do agree that the defendant is not liable for committing these torts if he acted neither intentionally nor negligently.<sup>3</sup>

1. [1965] 1 QB 232.

2. Compare W.V.H. Rogers, *Winfield and Jolowicz on Tort* (15th edn., 1998), 83–4 (favorable) with R.F.V. Heuston and R.A. Buckley, *Salmond and Heuston on the Law of Torts* (21st edn., 1996), 136–7 (critical).

3. In *Stanley v. Powell*, [1891] 1 Q.B. 86, the plaintiff claimed that the defendant was negligent, and the jury found that he was not. The court said that the absence of negligence was a defense in an action of battery, and that the defendant should

prevail since the jury verdict established that he was not negligent. In *Fowler v. Lanning*, [1959] 1 Q.B. 156, the plaintiff merely alleged that “the defendant shot the plaintiff.” The court held that the defendant had the burden of proving either intention or negligence. It was decided even earlier that the defendant is not liable for trespass to land if his entry was neither intentional nor negligent. *River Wear Commissioners v. Adamson*, [1877] 2 App. Cas. 743.

Here is a brief list of some of the torts which the common law courts have traditionally recognized as actionable in trespass together with a description of when the plaintiff could recover in modern English and American law.

### **Trespass in Assault and Battery**

Today we speak of two torts, battery and assault. In either case, the defendant is liable even if he did no harm although then the damages may be nominal.

To be liable for battery, he must make contact with the body of the plaintiff or something closely associated with the body such as a cane or a glass the plaintiff is holding. The contact must not be one that would normally be presumed to be acceptable. Thus the defendant is liable if he bashes the defendant on the head, or if he merely tweaks his nose or spits on him, but not if he merely taps the plaintiff on the shoulder to ask him the time.

Americans generally agree that the defendant is liable for battery whether or not the contact was “direct.” Thus the plaintiff can recover if the defendant poisons his drink or puts filth on a towel so that the plaintiff will rub it on himself.<sup>4</sup> Some English authors think that direct contact “may” still be required so that the defendant would not be liable for battery in these cases. He would be liable instead under the “principle in *Wilkinson v. Downer*” which will be described below.<sup>5</sup> To be liable for assault, the defendant must have done something that led the plaintiff to believe he may imminently be the victim of a battery. It is an assault to point a gun or throw a rock at someone. The plaintiff need not be put in fear but he must think that contact is about to occur. He cannot recover if his back was turned when the defendant shot at him, and he did not realize what was happening until the defendant was disarmed. He can recover if he sees the defendant is about to squirt him with a water pistol. The contact must be expected imminently: the plaintiff can recover if the defendant swings a fist at him but not if the defendant threatens to break his legs next week.

### **False Imprisonment**

The defendant is liable if he confined the plaintiff. The confinement may be in any space, large or small, and it does not matter how it is effected, by force or threats or fraud. The defendant is liable even if he mistakenly but reasonably thought he had the right to confine the plaintiff.

### **Trespass *Quare Clausum Fregit***

Today known as trespass to land. The defendant must enter, or cause something to enter, land in plaintiff's possession. He need not know that

4. Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, *Hornbook on Torts* (2nd edn., 2016), 67–8.

5. W.V.H. Rogers, *Winfield & Jolowicz on Tort* (15th edn., 1998), 64.

the land belongs to the plaintiff and he is liable even if he believes it belongs to himself. A trespasser is liable even if he did no harm although then only nominal damages may be awarded.

### **Trespass *De Bonis Asportatis***

Today known as trespass to chattels. The defendant must physically interfere with plaintiff's goods, for example, by damaging them or carrying them off. Again, he is liable even if he thought they were his own.

As we will see, English and American courts have added to the list by recognizing new torts. But to recover, the plaintiff still has to identify a particular tort which the defendant committed.

## **ii. From the Forms of Action to the Modern Torts**

Traditionally, the common law was not organized into the categories of tort and contract. It was organized around particular actions like those just described. Originally, the English royal courts only heard cases when a "writ" was issued by the royal chancellor. At first, new writs were devised as the occasion demanded, but eventually the number became fixed. Consequently, to win, the plaintiff had to fit his case within one of the existing writs or "forms of action."

The forms of action were not meant to be a list of rights or interests that the law ought to protect. They were merely the types of cases which, in the twelfth and thirteenth centuries, it was thought proper for the royal courts to hear.

In the nineteenth century, legislation was enacted abolishing the forms of action. The plaintiff no longer had to identify which writ covered his case. Supposedly, the law did not change. The courts would give a remedy only in the types of cases that would previously fit within one of the traditional forms of action. Nevertheless, the law did change as treatise writers and courts tried to make sense of the traditional law. Indeed, part of the reason for the change may have been that, for the first time, the common lawyers were trying to think systematically about their law. The first university courses in the common law were taught by William Blackstone in the eighteenth century, who was also one of the first to write a common law treatise: *Commentaries on the Laws of England*. Before his time, there was little legal literature except for a few medieval tracts and the reports of decided cases. The first treatise on the common law of contracts was written by Powell in 1790.<sup>6</sup> The first treatise on the common law of torts was written by Hilliard in 1861.<sup>7</sup> In the process of trying to understand the common law, the treatise writers innovated.

One innovation was to say, as Blackstone did, that certain of the traditional forms of action constituted a law of torts. These forms of action became the particular torts of the modern common law.

6. John J. Powell, *Essay Upon the Law of Contracts and Agreements* (1790).

7. Francis Hilliard, *The Law of Torts or Private Wrongs* 1 (1861).

Another innovation was to say, as the civil lawyers had done for centuries, that the two principal grounds on which the defendant might be liable were intent and negligence. "Negligence" was recognized for the first time as a separate tort. There had never been a writ of "negligence," nor had the plaintiff ever had to allege that the defendant was negligent to bring any of the traditional actions.

Still another innovation, and the one that concerns us here, concerns the way that the particular torts were understood. Beginning with Blackstone, common law treatise writers identified the forms of action with different rights or interests which the law was attempting to protect. Blackstone distinguished actions that protected personal property (*trespass de bonis asportatis* and *trover*), those that protected real property (*trespass quare clausum fregit*), and those that protected the "personal security of individuals" against injuries to "their lives, their limbs, their bodies, their health or their reputations."<sup>8</sup> While the treatise writers of the nineteenth and early twentieth centuries proposed different classifications, like Blackstone, they looked for a correspondence between forms of action and interests to be protected.<sup>9</sup> Hilliard and Addison, in two of the first treatises on tort law, explained that for the plaintiff to recover, he must have suffered some "injury"<sup>10</sup> or "damage."<sup>11</sup> Pollock and Salmond, in their more systematic works, said that he must have suffered some "harm."<sup>12</sup> Later writers such as Harper and Prosser spoke of the violation of "interests demanding protection"<sup>13</sup> or "legally recognized interests."<sup>14</sup> All of them, like Blackstone, tried to identify the traditional forms of action with the protection of distinct types of interests or the prevention of distinct types of harm, damage, or injury.

At the same time, they tried to formulate a definition or list of the elements that the plaintiff must establish to recover under each of the forms of action. Judges traditionally had not decided cases by asking what type of harm the plaintiff had suffered or by formulating such lists. They decided them by looking for resemblances to clear cases in which an action would surely lie.

One problem for the treatise writers was to find a formula that could fit decisions that had not been made by a formula but by looking for such resemblances. A further problem was that the cases did not always correspond closely to a distinct interest worthy of protection. When they did, it was easy for the treatise writers to define a particular tort in terms of that

8. William Blackstone, *Commentaries on the Laws of England* 3 (1765–69), \*119.

9. *Ibid.* 119–27.

10. Hilliard, *Torts* 1, 83–4.

11. C.G. Addison, *Wrongs and their Remedies. A Treatise on the Law of Torts* 1 (F.J.P. Wolferton, ed., 4th English edn., 1876), 2.

12. Sir Frederick Pollock, *The Law of Torts. A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* 6 (8th edn., 1908), 6; John

W. Salmond, *The Law of Torts. A Treatise on the English Law of Liability for Civil Injuries* (4th edn., 1916), 8.

13. Fowler Vincent Harper, *A Treatise on the Law of Torts A Preliminary Treatise on Civil Liability for Harms to Legally Protected Interests* (1933), 5.

14. William L. Prosser, *Handbook of the Law of Torts* (1941), 8–9. Similarly, Restatement of Torts § 1 cmt. d (1934) ("legally protected interests"); Restatement (Second) of Torts § 1 cmt. d (1965) (same).

interest. For example, false imprisonment could be defined in terms of confinement which deprived the plaintiff of his freedom of movement. Otherwise, unless the treatise writers were to challenge the cases, their choices were limited. They could devise a formula that fit the cases and then invent some reason why it corresponded only roughly to an interest worth protecting. They could redescribe the interest in question to make it fit their formula more closely. Or they could ignore the problem.

For example, the earliest treatise writers said that battery protected a person against bodily harm. Yet bodily harm was not all that mattered, as one can see from their definitions of battery, which still looked more like graphic images than boundary lines. Battery is “violence” inflicted on a person<sup>15</sup> or as “an angry, rude, insolent or revengeful touching.”<sup>16</sup> Later definitions were less graphic. For example, according to Bigelow and Salmond, battery is an “application of force” to “the person of another” that is “unpermitted”<sup>17</sup> or “without lawful justification.”<sup>18</sup> But force did not mean harm. Even a person who had not been harmed could recover.<sup>19</sup> Some writers did not try to explain why. Some found a reason why legal protection extended beyond the interest supposedly in question. The reason, according to Clark, was “the very great importance attached by the law to the interest in physical security.”<sup>20</sup> According to Seavey, a “very slight interference is sufficient” because the interest “in bodily integrity” is one of the “most highly protected.”<sup>21</sup> Salmond redescribed the interest in question: it is “not merely that of freedom from bodily harm, but also that of freedom from such forms of insult as may be due to interference with his person.”<sup>22</sup>

Harper, Prosser and the Restatements agreed,<sup>23</sup> and so were able to redefine battery in a way that fit the cases and also corresponded to the interests that Salmond had identified: plaintiff can recover for “unpermitted unprivileged contacts with [his] person”<sup>24</sup> for “harmful or offensive touching.”<sup>25</sup>

Similarly, according to the earlier treatise writers, an action of assault was supposed to protect a “right not to be put in fear of personal harm.”<sup>26</sup>

15. Hilliard, *Torts* 1, 201; Francis M. Burdick, *The Law of Torts. A Concise Treatise on the Civil Liability at Common Law and under Modern Statutes for Actionable Wrongs to Person and Property* (2nd edn., 1908), 268.

16. Hilliard, *Torts* 1, 201. See Addison, *Wrongs*, 2, 692 (“the person of a man is actually struck or touched in a violent, rude or insolent manner”); Burdick, *Torts*, 268 (“touching of another in anger”); Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* (1880), 162 (“injury . . . done . . . in an angry or revengeful or rude or insolent matter”).

17. Melville M. Bigelow, *Elements of the Law of Torts for the Use of Students* (3rd edn., 1886), 101.

18. Salmond, *Torts*, 382.

19. For example, Bigelow, *Torts*, 101 (“any forcible contact may be sufficient”); Salmond, *Torts*, 382 (force may be “trivial”).

20. George L. Clark, *The Law of Torts* 10 (1926).

21. Warren Seavey, “Principles of Torts,” *Harvard Law Review* 56 (1942), 72.

22. Salmond, *Torts*, 383.

23. Prosser, *Torts*, 44–5; Harper, *Torts*, 38; Restatement of Torts ch. 2, titles of topics 1 and 2 (1934); Restatement (Second) of Torts ch. 2, titles, topics 1 and 2 (1965).

24. Prosser, *Torts*, 43.

25. Harper, *Torts*, 39. See Restatement of Torts §§ 13, 15, 18–19 (1934); Restatement (Second) of Torts §§ 13, 15, 18–19 (1965).

26. Cooley, *Torts*, 161. See Burdick, *Torts*, 266 (“the right to live in society without being put in reasonable fear of unjustifiable personal harm”).



Yet, as one can see even from the graphic, image-like descriptions of the earliest treatise writers, this action did not protect against all reasonable fear of harm, or only against fear of harm. They described assault as “an unlawful setting upon one’s person”; or a threat of violence exhibiting the intention to assault, and a present ability to carry the same into execution”;<sup>27</sup> an “attempt . . . to offer with force and violence to do hurt to another.”<sup>28</sup> Later writers, somewhat more tamely, defined assault as “an attempt, real or apparent, to do hurt to another’s person, within reaching distance”;<sup>29</sup> “an attempt with unlawful force to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented.”<sup>30</sup> None of them claimed, however, that the plaintiff could recover always or only when he had been put in fear. As before, some like Seavy said that the reason was the importance of personal security as though that explained the matter.<sup>31</sup> Harper, Prosser and the Restatements, however, redefined the interest at stake as “the interest in freedom from apprehension of a harmful or offensive contact.”<sup>32</sup> That interest corresponded to their more precise definition of assault: it required the “apprehension of a harmful or offensive contact” where apprehension simply means the awareness that such a contact may imminently occur.<sup>33</sup>

Similarly, the plaintiff’s property was supposedly protected by an action by trespass to land, his reputation by actions for libel and slander. Yet the plaintiff could recover for trespass if the defendant entered his land even if he did no physical damage. This time, none of the treatise writers managed to redescribe the interest at stake to make it conform to the circumstances under which the plaintiff could recover. Some of them found reasons why the law would impose liability when no harm was done. Some said that the law “presumes”<sup>34</sup> or “implies”<sup>35</sup> damage. According to Salmond, “[t]he explanation [is] that certain acts are so likely to result in harm that the law prohibits them absolutely and irrespective of the actual issue.”<sup>36</sup> According to Seavy, the reason was that like the interest in bodily integrity, the interests “in the possession and ownership of land, are [among] the most highly protected.”<sup>37</sup> Some merely let the matter pass.

These explanations made it sound as though somebody – “the law” – had already decided what interests were worth protecting and how to protect them. Supposedly, for example, the law had decided to protect one’s interest in not being offended but only against offence by physical contact; it had decided to protect one’s freedom from the apprehension of imminent harmful or offensive physical contact whether one was put in fear or not; it had decided not only to protect one’s interest in land or

27. Hilliard, *Torts* 1, 197.

28. Addison, *Wrongs* 2, 690.

29. Bigelow, *Torts*, 98.

30. Cooley, *Torts*, 160.

31. Seavey, “Principles of Torts.”

32. Prosser, *Torts*, 48; Harper, *Torts*, 43 (same, but speaking of a “harmful or offensive touching”); Restatement of Torts

ch. 2, title of topic 3 (1934); Restatement (Second) of Torts ch. 2, title of topic 3 (1965).

33. Prosser, *Torts*, 48; Harper, *Torts*, 43; Restatement of Torts § 21 (1934); Restatement (Second) of Torts § 21 (1965).

34. Hilliard, *Torts* 1, 87

35. Burdick, *Torts*, 338.

36. Salmond, *Torts*, 12.

37. Seavey, “Principles of Torts.”



reputation but to allow recovery even when neither had suffered harm. The treatise writers suggested that the law had made all these decisions without saying that they themselves agreed on the merits. The matter is presented in much the same way in textbooks today. The common law torts are said to correspond to the legal interests that the law had decided to protect.

As an historical matter, however, such decisions had never been made. Trespass in assault and battery dates from a time when breaches of the peace often led to private vengeance, when the distinction between civil and criminal liability was not yet clear in everyone's mind, and when the very concept of tort as a distinct body of law was centuries off. The rules governing trespass in land were laid down before there were declaratory judgments. As Prosser himself observed, an action in trespass was used, not merely to redress an injury, but to vindicate "a legal right without which the defendant's conduct, if repeated, might in time ripen into prescription."<sup>38</sup> Historically, it would be hard to reconstruct what the common law judges had in mind when they set boundaries to the traditional forms of action. Surely, however, they were not considering what interests each form of action should protect and the best way to protect them.

However that may have been, common lawyers still determine whether the plaintiff can recover by asking what tort, if any, the defendant has committed. Since the traditional torts did not represent a list of rights or interests in which the defendant ought to be protected, inevitably, cases arise in which, although he should be protected, there is no appropriate tort. In those cases, the court must either deny relief, or stretch the boundaries of some existing tort, or invent a new tort.

### **c. Chinese Law**

#### **i. The Absence of Private Law**

In the first three decades of the Communist regime, tort law virtually disappeared along with the private ownership of means of production and contractual transactions. Tort law lost its practical significance when private ownership and contractual freedom were deemed to be illegitimate, and when the protection of personal rights also had to give way to massive political changes taking place during political campaigns such as the anti-rightists campaign and the Cultural Revolution during those thirty years. Though civil rights were protected by the Constitutions of 1954 and 1975, these bills of rights had little practical significance due to the lack of implementing legislation. As a result, the Constitutions were hardly applied in practice. In this period of time, tort law only existed in customary law and in some special types of tort in special statutes such as the Environment Protection Law and the Patent Law.

38. Prosser, *Torts*, 81.

## ii. The Sources of Contemporary Chinese Tort Law

In the late 1970s, the adoption of the reform and openness policy after the Cultural Revolution, China reintroduced private ownership in both rural and urban areas through the introduction of a land contract system and urban business households.

The first piece of written law that introduced the general principles and rules of tort law was the General Principles of Civil Law (GPCL), which became effective on January 1, 1987. Though GPCL also provides the foundation of Chinese tort law, rules on various perspectives of the tort law were fragmentary and can be seen in various parts of the GPCL, which was therefore lacking an organized logical structure on tort law. After years of drafting, the Tort Liability Law (TLL) was enacted in 2009 and became effective on July 1, 2010. It was the first post-1949 code of tort law, and part of China's continued effort to complete a civil code. Other than these two major statutes, tort law is dealt with in several of the Supreme Court's judicial interpretations, which are issued in a codification-like form and are not case specific, the Supreme Court's replies to specific inquiries by lower courts, specific on the interpretation of particular points of law, and several special statutes. The interpretations on tort law are to be found in a variety of sources: the Supreme Court's Opinions on the implementation of General Principles of Civil Law (1988), the Supreme Court's clarifications of several issues arising under the Tort Liability Law (2010), the Supreme Court's interpretations of the law governing personal injury cases (2003), and the Supreme Court's interpretations of the law governing tort liability for non-economic harm (2001). Most recently, General Provisions of Civil Law was enacted by congress in 2017, which is intended to become the first book of future Chinese civil code. General Provisions reinforced certain general principles of tort law laid down by General Principles of Civil Law and Tort Liability Law. At present, both 2017 General Provisions of Civil Law and 1986 General Principles of Civil Law are in force.

Contemporary Chinese tort law has adopted the fault liability regime with the supplements of strict liability and "liability in equity." Though tort law damage is still considered compensatory in nature, punitive damages are allowed in the areas of product liability if the producer's intention or knowledge of the defect can be proved.<sup>1</sup> The victim can also recover for moral damage arising out of torts to personal rights and interests that have caused her severe mental distress.<sup>2</sup> In addition, in contrast to the Republic of China's (ROC's) Civil Code, Article 188, vicarious liability is based on non-fault liability following the Anglo-American and French traditions – an employer will be jointly liable for the tort committed by an employee during the course of employment even if the employer has exercised due care in the selection and control of the employee.<sup>3</sup>

1. See TLL art. 47.

2. See TLL art. 22.

3. For example, see Supreme Court's Interpretations on Personal Injury Cases, art. 9.

### iii. The Scope of Rights Protected

Every tort law system has to deal with a fundamental question – what rights are to be recognized and protected by tort law? If one only looks at the wording of civil codes, one might think that some tort law systems protect a person against every sort of harm while others protect a select list of rights enumerated in the civil code. The French Civil Code seems to take the first approach. Article 1240 provides: “Any act of a person which causes harm to another obligates the person through whose fault the harm (*dommage*) occurred to make compensation for it.” The German Civil Code seems to take the second. Section 823(1) provides: “A person who intentionally or negligently unlawfully (*widerrechtlich*) injures the life, body, health, freedom, property or similar right (*sonstiges Recht*) of another is bound to compensate him for any damages that thereby occurs.”

It is not clear which way Chinese tort law is headed. One article of the TLL seems to adopt the German approach:

#### **Tort Liability Law of the People’s Republic of China**

##### ARTICLE 2(2)

Civil rights and interests used in this Law shall include the right to life, the right to health, the right to name, the right to reputation, the right to honor, right to image, right of privacy, marital autonomy, guardianship, ownership, usufruct, security interest, copyright, patent right, exclusive right to use a trademark, right to discovery, equities, right of succession, and other personal and property rights and interest.<sup>4</sup>

Another seems to adopt the French approach:

#### **Tort Liability Law of the People’s Republic of China**

##### ARTICLE 6

A person is liable in tort for the infringement of other’s civil rights through his fault.

Chinese law is unlikely to go to either extreme. Neither, as we shall see, does French or German law. French law does not protect a person against every type of harm. German law only protects those specified in the Code.

With the enactment of the Chinese Civil Code, it looks like the French way has won as Article 2-2 is dropped and Article 6 is now article 1165-1 of the Civil Code. In addition, a unique feature of the Chinese Civil Code is the addition of a book on personality rights, which is a book independent of torts.

##### ARTICLE 1165-1

Where an actor harmed another’s civil interests and caused damage through his fault, he shall be liable in tort.

4. TLL art. 2.

## ARTICLE 990

Personality rights are rights enjoyed by civil subjects including the right to life, the right to body, the right to health, the right to one's name, the right to name, the right to one's image, the right to honor, the right to reputation, the right to privacy etc.

In addition to the personality rights mentioned above, natural persons enjoy other personality interests based on personal freedom and dignity.

## 2. Harm to Dignity

### a. Insult in General

#### Traditional Common Law

Before the enactment of a statute on "harassment" in England, and the recognition of a new tort of intentional infliction of mental distress in the United States, plaintiff had to bring his case within one of the traditional torts.

**Edwin Peel and James Goudkamp, *Winfield and Jolowicz on Tort* (19th edn., 2014), 58–60**

"Any contact with the body of the claimant (or his clothing) is sufficient to amount to a battery.

...

Life would be too difficult if the law did not place limits on the types of bodily conduct that were actionable ... Perhaps the closest we can get to the central idea is to say that conduct must be 'offensive' in the sense that it infringes the claimant's right to be physically inviolate, to be 'let alone.' To say, however, that there must be something offensive to dignity seems to be going too far, at least if *Nash v. Sheen*<sup>[37]</sup> is correctly decided. In that case it was held to be battery where the claimant went to a hairdresser for a permanent wave, and the defendant, without her consent, applied a tone rinse which produced a skin reaction. Even this rather vague formulation may not cover every case: for example, the indecent touching of a small child is clearly a battery even though the child may have insufficient understanding to 'take offence.' Whatever the theoretical basis of liability, we can say that touching another in the course of a conversation to gain his intention is not a battery."

**Note.** In footnote 37, *Nash v. Sheen* is cited to "The Times, March 13, 1953."

**Leichtman v. WLW Jacor Communications, Inc., 634 N.E. 2d 697 (Ohio App. 1994)**

Plaintiff, an anti-smoking advocate, was invited to appear on a radio talk show to discuss the evils of smoking and breathing secondary smoke. He alleged that while he was in the studio, Furman, a talk show host with a

different show, who was an employee of the defendant, lit a cigar and repeatedly blew smoke in his face “for the purpose of causing physical discomfort, humiliation, and distress.” The court held that Furman’s act constituted a battery. The contact requirement was met because “tobacco smoke, as ‘particulate matter,’ has the physical properties capable of making contact.”

**Western Union Telegraph Co. v. Hill, 150 So. 709 (1933)**

Sapp was in charge of a telegraph office. When the plaintiff’s wife entered on business, he offered to “love and pet her” and reached for her with his hand. The court held that whether he committed an assault depended on the width of the counter. If, as some of the evidence indicated, it was so wide that he could not have touched her, there was no assault. If, as other evidence indicated, he could have reached from six to eighteen inches beyond the counter to where she was standing, then there was an assault. The court ruled that the trial court had rightly left this question to the jury.

**Note.** Although traditionally, in England as in the United States, a plaintiff could recover for insult if he could bring his case within one of the traditional torts, it is not clear that either of these cases would have come out the same way in England or in other American states. According to a leading English treatise: “It is unclear whether the infliction of such things as heat, light or smoke on a person constitutes a battery, although they probably do not. Smoke is, from scientific point of view, particulate matter but for the purposes of trespass to land it has been treated as intangible and therefore as falling into the realm of nuisance.”<sup>1</sup> Moreover, the requirement that the victim of an assault must apprehend imminent harm has been construed less strictly than in *Western Union Telegraph Co. v. Hill*. In a criminal case, *Regina v. Ireland*, [1997] 3 W.L.R. 534, it was held that even a silent telephone call could be an assault.

**Modern English Law**

**Wilkinson v. Downton, [1897] 2 Q.B. 57**

“In this case, the defendant, in the execution of what he seems to have regarded as a practical joke, represented to the plaintiff that he was charged by her husband with a message to her to the effect that her husband was smashed up in an accident, and was lying at The Elms at Leytonstone with both legs broken, and that she was to go at once in a cab with two pillows to fetch him home. All this was false. The effect of the statement on the plaintiff was a violent shock to her nervous system, producing vomiting and other more serious and permanent physical consequences at one time threatening her reason, and entailing weeks of

1. Edwin Peel and James Goudkamp, *Winfield and Jolowicz on Tort* (19th edn., 2014), 59.

suffering and incapacity to her as well as expense to her husband for medical attendance ...

The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff – that is to say, to infringe her right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant.

It remains to consider whether the assumptions involved in the proposition are made out. One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person who proved to be in an ordinary state of health and mind. I think that it was. It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore the intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated for that is commonly the case with all wrongs."

**Tony Weir, *A Casebook on Tort* (8th edn., 1996), 340 [case and commentary omitted in later editions]**

"In this very illustrative case, a deliberate lie destroyed the plaintiff's peace of mind and caused her physical harm. These facts did not, however, quite fit the form of any established tort. Although the appropriate interest (peace of mind) was affected, it was not quite *assault*, since the defendant did nothing but speak, and trespass requires an act. It was not quite *deceit*, since the plaintiff took no detrimental action, except paying for her friends to take the train. Nor was *negligence* appropriate, since shock damage resulting from unreasonable behavior was not compensable in 1897. However, the defendant's behaviour was not just unreasonable, it was wilful; the harm was not just foreseeable, it was the calculated result; and there was a special relationship between the parties, who were face-to-face. So it was entirely correct of Wright, J., to infer and state a new principle of liability."

**Edwin Peel and James Goudkamp, *Winfield and Jolowicz on Tort* (19th edn., 2014), 70**

"One difficulty with *Wilkinson v. Downton* is that it is doubtful whether the case really imposes liability for intentionally caused harm given that it is most unlikely that the defendant in that case intended to produce the result which he did or even foresaw it. Essentially, Wright J imputed an intention to the defendant. Note also that the phrase 'calculated to cause harm' is ambiguous. It could refer to harm that is actually contemplated or intended by the defendant or to harm which a reasonable person would foresee as a probable result and it is the latter which fits the



facts. If 'calculated to cause harm' merely refers to negligence, it is doubtful whether the action really establishes a separate tort."

### **The Protection from Harassment Act 1997 c. 40**

#### **(1). Prohibition of harassment.**

1. A person must not pursue a course of conduct:
  - (a). which amounts to harassment of another, and
  - (b). which he knows or ought to know amounts to harassment of the other.
2. For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.
3. Subsection (1) does not apply to a course of conduct if the person who pursued it shows:
  - (a). that it was pursued for the purpose of preventing or detecting crime,
  - (b). that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
  - (c). that in the particular circumstances the pursuit of the course of conduct was reasonable.

#### **(2). Offence of harassment.**

1. A person who pursues a course of conduct in breach of section 1 is guilty of an offence.
2. A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both ...

#### **(3). Civil Remedy.**

1. An actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.
2. On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment ...

#### **(4). Putting people in fear of violence.**

1. A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an

offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.

2. For the purposes of this section, the person whose course of conduct is in question ought to know that it will cause another to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion.

...

(7). Interpretation of this group of sections.

1. This section applies for the interpretation of sections 1 to 5.
2. References to harassing a person include alarming the person or causing the person distress.
3. A "course of conduct" must involve conduct on at least two occasions.
4. "Conduct" includes speech.

**Edwin Peel and James Goudkamp, *Winfield and Jolowicz on Tort* (19th edn., 2014), 75**

"The Equality Act 2010 provides for further statutory cause of action for harassment. The relevant provisions of this Act are lengthy and complicated ... By contrast with the Protection from Harassment Act 1997, the Equality Act 2010, in s. 26, provides a detailed definition of harassment. The definition is in two parts. The first part requires that there must be 'unwanted [conduct] related to a protected characteristic.' These characteristics are age, disability, gender reassignment, race, religion or belief, sex and sexual orientation. The second part requires that the conduct has the purpose [or] effect of violating the victim's dignity or 'creating an intimidating, hostile, degrading, humiliating or offensive environment' for the victim. A major point of distinction between the action provided by the Equality Act 2010 and the Protection from Harassment Act 1997 is that whereas the latter is available against all persons, the former lies against only certain persons, including employers, providers of public services, those who perform public functions, people who dispose of or manage premises, and providers of education. Another difference between the two actions is that behavior can constitute harassment under the Equality Act 2010 even though it does not constitute a 'course of conduct.' A one-off act is capable of triggering liability under that act."

**Modern Law in the United States**

**Restatement (Second) of Torts**

§ 46 OUTRAGEOUS CONDUCT CAUSING SEVERE EMOTIONAL DISTRESS

- (1). One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

- (2). Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress:
  - (a). to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
  - (b). to any other person who is present at the time, if such distress results in bodily harm.

**Halio v. Lurie, 222 N.Y.S.2d 759 (N.Y. A.D. 1961)**

"[I]t is alleged that the plaintiff, a native of Turkey, and a citizen of this country, is an unmarried young woman; that plaintiff and defendant had been keeping company for about two years with a view to their ultimate marriage; that while they were still doing so, defendant married another woman without plaintiff's knowledge, and concealed the marriage from the plaintiff, who discovered it only by accident; that the relations between the parties then ceased, and that defendant thereafter composed and mailed to plaintiff, in an envelope addressed to Mrs. Vicky Halio, a communication in verse entitled 'An Ode to Vicky' in which he referred to her as 'the tortured Turk,' taunted her with her unsuccessful efforts to marry him, intimated that she had made a false claim that he was under an obligation to marry her, declared that he had avoided marriage to her because he was 'wise to her game,' and expressed the view that through the coming years she would be the object of derision and the subject of amusement, on the part of his wife and himself, by reason of her 'phone calls galore' (presumably to complain that she had not accomplished her purpose to marry him)."

The plaintiff recovered for infliction of emotional distress.

**Flamm v. Van Nierop, 291 N.Y.S. 2d 189 (N.Y. A.D. 1968)**

"Plaintiff alleges that defendant has maliciously caused him and is now causing him and will continue to cause him mental and emotional distress, sleeplessness, physical debilitation, and irreparable damage, by the following course of conduct: dashing at plaintiff with threatening gestures and malign looks accompanied by derisive laughter, walking closely behind or beside or in front of plaintiff on the public streets, telephoning plaintiff at his home and place of business and then either hanging up or remaining on the line in silence, and driving his automobile behind that of plaintiff at a dangerously close distance; wherefore plaintiff asks for damages and an injunction. This sufficiently states a cause of action for damages for the intentional infliction of emotional and physical harm, and for an injunction. Special damages need not be alleged. Probably this also states a cause of action for assault.

If a man finds himself perpetually haunted by an enemy; if he is greeted at every turn by baleful looks, sudden sorties which fall short of physical contact, and derisive laughter; if he cannot drive his car without

the imminent threat of a collision from the rear; and if he is troubled at all hours by telephone calls followed only by silence, then it can hardly be doubted that he is being subjected to the extreme and outrageous conduct which gives rise to a cause of action in tort.”

**Note on Racial Insults.** In a number of cases, plaintiffs have recovered for racial or ethnic insults; e.g., *Alcorn v. Anbro Engineering, Inc.*, 468 P.2d 216 (Cal. 1970) (plaintiff called a “god damn nigger” by his white foreman); *Gomez v. Hug*, 645 P.2d 916 (Kan. App. 1982) (plaintiff, a county employee, called a “fucking spic,” a “fucking Mexican greaser,” and “nothing but a pile of shit” by the county commissioner); *Wiggs v. Courshon*, 355 F. Supp. 206 (S.D. Fla. 1973) (plaintiff called a “black son of a bitch” by the waitress who brought him his food). In contrast, plaintiff did not recover in *Patterson v. McLean Credit Union*, 805 F.2d 1143 (4th Cir. 1986) (plaintiff’s supervisor alleged to have harassed her for racial motives by assigning her too much work, assigning her sweeping and dusting that was not assigned to whites, telling her that blacks work slower than whites, and staring at her for minutes at a time).

## Restatement (Second) of Torts

### § 46: SPECIAL LIABILITY OF PUBLIC UTILITY FOR INSULTS BY SERVANTS

A common carrier or public utility is subject to liability to patrons utilizing its facilities for gross insults which reasonably offend them, inflicted by the utility’s servants while otherwise acting in the scope of their employment.

## French Law

In a criminal case, the victim can participate as a “civil party” (*partie civile*). If the defendant is convicted, he can be ordered to pay the victim damages. Thus typically in France, a party who has been offended will make a complaint so that a criminal action is brought against the person who offended him. That is why many of the cases that follow are criminal prosecutions.

The plaintiff is deemed to have suffered “harm” for which he can recover under Articles 1240–1 of the Civil Code when the defendant commits the crimes of defamation and insult. The defendant who has told a falsehood about the victim can be prosecuted for defamation (*diffamation*). According to Article 29(1) of the Law of July 29, 1881, defamation includes “any allegation or imputation of a fact that harms the honor or respect of the person or body to whom the fact is imputed.” The cases that follow do not deal with defamation but with *injure* which comes from the Latin *iniuria* and which we will translate as “insult.” According to Article 29(2) of the law just cited, an insult is “any outrageous expression, words of contempt or invective that does not include the imputation of any fact.” That provision applies to insults that are made “in public.” Article R-621–2 of the Criminal Code (*Code pénal*) prohibits “non-public insult of a person” without defining the word “insult” any further.

**Cour de cassation, ch. crim., December 3, 1970, pourvoi no. 69-92.381**

The defendant was convicted of insult (*injure*) and ordered to pay damages to Regine Zylberberg who was a civil party (*partie civile*) to the criminal action. His magazine *Correfour* had printed an article condemning what it called a decline in morals. It was entitled, "Why are our children no longer safe? Too many fools at liberty." It was illustrated by a photograph of the complainant in the company of a third party (no other details are given) with the caption: "Snobism and hysteria. Regine Zylberberg (the mountain of money) – Regine for short – receives Sammy Davis, Jr. The talented American showman deserves better." The defendant argued that the term "hysteria" did not constitute a term of disdain or invective; that it indicates "a sickness or, at the most, a disorder of the nervous system." Rejecting that contention, the *Cour de cassation* said that "in the ensemble composed of the article, the photograph, and the caption, and taking account of the desire to which it indicates, the word 'hysteria' tends to represent Zylberberg is part of a corrupt circle of snobs and hysterics whose activities are condemned in the article ... [so that] in this association of ideas no medical significance should be given to this word which can only be understood in its common meaning as indicating a penchant to debauch."

**Jean Larguier and Anne-Marie Larguier, *Droit pénale special* (8th edn., 1994)**

"*Outrageous expressions*: examples taken from the case law: 'bandit, riffraff (*canaille*), traitor, pirate, little demagogue, filth, mountain of dung, dirty sewer stream, tart kosher pork butcher, *buse* (which means "buzzard" but can be used figuratively to mean blockhead), paranoid.' But it is not an insult to suggest that someone submit his resignation (Versailles, 1986)."

**German Law**

The German Criminal Code (*Strafgesetzbuch*) also contains provisions on interference with reputation and dignity. It distinguishes "insult" (*Beleidigung*), "wrongful dissemination" (*üble Nachrede*) and "defamation" (*Verleumdung*). A statement is an "insult" if it affects a person's "good reputation" (*der gute Ruf in seiner realen Existenz*). StGB § 185(1). An "insult" need not be a statement of fact. In contrast, "wrongful dissemination" and "defamation" are committed by making a statement of fact which "brings [another] into contempt or lowers him in public opinion." Criminal Code §§ 186, 187. To constitute "wrongful dissemination" the statement must be one which is "not demonstrably true." Criminal Code § 186. To constitute defamation, the statement must be "demonstrably untrue" and made "against one's better knowledge" (*wider besseres Wissen*). Criminal Code § 187.

As we have seen, the drafters of the German Civil Code did not want people to be liable for the types of harm covered by the action for *iniuria*. Section 823(1) says that the plaintiff can only recover for injury to the “life, body, health, freedom, ownership or similar right (*sonstiges Recht*) of another.” Originally, “similar right” was not supposed to include personal dignity. Section 823(2) said that the obligation to make compensation also rests “on a person who infringes a statute intended for the protection of others.” As we have just seen, people are protected against defamation and insult by the German Criminal Code (*Strafgesetzbuch*). But to prevent them from recovering damages in tort, the drafters added the following provisions.

### German Civil Code

#### § 253(1) NON-PHYSICAL HARM

(originally § 253(1))

In the case of harm that is not economic, compensation in money can be demanded only in the cases specified by statute.

[§ 847(1) (NO LONGER IN FORCE)]

In the case of injury to body or health or deprivation of liberty, the injured party may also demand fair compensation in money for non-economic harm.

#### § 253(2) NON-PHYSICAL HARM

(This provision replaced § 847(1) by legislation enacted in 2002.)

In the case of injury to body, health, liberty or sexual self-determination, fair compensation in money can be required for non-economic harm.

Those provisions made it as clear as possible that, at the time the Code was enacted, the plaintiff was not supposed to recover for injuries to his dignity or privacy. But today German courts allow him to recover anyway. In 1954, the *Bundesgerichtshof* declared that *Persönlichkeit* – “personality” – was a “similar right” within the meaning of § 823(1) of the German Civil Code. It held that a newspaper had violated this right by publishing a letter written by a lawyer on his client’s behalf as though it was written by him spontaneously and expressed his own views. BGHZ 13, 334. As we will see, since then it has awarded damages in many cases. The court’s justification for disregarding the text of the German Civil Code is that Articles 1 and 2 of the German constitution (*Grundgesetz*) protect human dignity and personal freedom, and without a civil action, this protection would be incomplete.

### Constitution of the Federal Republic of Germany (*Grundgesetz*)

#### ARTICLE 1: THE WORTH OF A HUMAN BEING

- (1). The worth of a human being is unassailable. It is the duty of all state power to attend to it and protect it.



- (2). The German people accordingly acknowledges that inviolable and inalienable human rights are the basis of every human community, of peace, and of justice in the world.
- (3). The following basic rights are binding upon legislation, executive power, and judicial decisions as the law in force.

ARTICLE 2: FREEDOM OF THE PERSON, RIGHT TO LIFE AND PHYSICAL INTEGRITY

- (1). Each person has the right to the free development of his personality (*Persönlichkeit*) insofar as he does not injure the rights of others and does not violate the constitutional order or moral law.
- (2). Each person has the right to life and physical integrity. The freedom of a person is inviolable. Incursion on these rights can only occur on the basis of a statute. . . .

ARTICLE 5: THE RIGHT TO FREE EXPRESSION OF OPINION

- (1). Each person has the right freely to express and disseminate his opinion through word, writing, or image and to disseminate and to inform himself without hindrance through generally accessible sources.
- (2). These rights are limited by the provisions of general statutes, statutory provisions in the protection of the young, and in the right to personal honor (*Ehre*).
- (3). Art and science, research and teaching are free. The freedom of teaching does not release one from loyalty to the constitution.

**Bundesgerichtshof, January 16, 1951, NJW 1951, 368**

Little is reported of the facts except that the defendant put his hand under the skirt of Frau C. who was a stranger, and that she brought charges of rape and lewd behavior against him. The court dismissed these charges but held that the defendant was guilty of insult.

“What constitutes an insult is the manifestation of disrespect for the injured party . . . He gave the impression that he expected that Frau C. would permit such an attack on her sexual honor. It is not a part of the external factual elements of insult that the defendant intended his behavior to be insulting, nor that the person concerned experienced and understood the act as an insult. It is decisive that the conduct of the defendant toward the woman in the circumstances of the case in general is to be understood as a manifestation of disrespect.

The manifestation of disrespect must, however, be unlawful to legally justify condemnation for insult. The insult is not unlawful if and so long as an adult woman consented to the lewd contact with her body.”

**Oberlandesgericht, Düsseldorf, August 10, 1989, JR 1990, 345**

[To follow the next case, you have to know that German has two pronouns that mean “you”: “du” (“dich” in the accusative case) and “sie.”

You are supposed to use the first with friends and the second in more formal relationships.]

“The *Amtsgericht* regarded the factual elements of insult as met by the use of the words ‘du’ and ‘dich’ according to the complaint of the witness Z, because in view of the tense relationship between the witness and the defendant, the use of ‘du’ could only have meant disrespect. The opinion of the *Amtsgericht* cannot survive judicial scrutiny.

For the question of whether there has been an injury to honor, one must take into account not only the surrounding circumstances but also the views, the customs of life and the social circumstances of the parties, as well as the linguistic and social place where the expression occurred. (See Dreher/Tröndle, *StGB* 44th edn. § 185 St.GB no. 8 with further references; Schönke/Schröder/Lenckner 23rd edn. § 185 *StGB* no. 8 with further references.)

According to the findings of the *Amtsgericht*, there was a close relationship between the parties before their quarrel when they lived in the same house and usually called each other ‘du.’ By itself, consideration of the circumstance that the witness Z forbade the defendant to call her ‘du’ does not prove that by the use of the words ‘du’ and ‘dich’ on 5 September 1988 there was a manifestation of disrespect for the witness.”

### **Oberlandesgericht, Düsseldorf, July 7, 1989, JR 1990, 126**

When an acquaintance of the defendant, E.M., was on trial for fraud before the 10th criminal chamber of the *Landgericht* for Düsseldorf, the defendant sent a letter to the presiding judge of the chamber under the heading “circle of friends” of E.M. It said: “The circle of friends of E.M. attach importance to the conclusion that here the law has been massively bent and the health of a man has been trampled under foot by the legal authorities in a manner once known only in totalitarian states.” He was protesting the removal of E.M. from a clinic to stand trial. Feeling offended, the judge had criminal charges brought before the *Amtsgericht* which convicted the defendant of insult. The defendant claimed that he merely wanted to call attention to the inappropriate treatment of E.M., and that he had not known the judge would be so sensitive. The *Oberlandesgericht* overturned his conviction. It said that the relevant question “is not how the sender understood the letter. In evaluating a possibly injurious statement attention must rather be paid to how the statement in its context would be read by a naive and unsophisticated reader, a reasonable third party.” The lower court had made the mistake of looking only at its “literal sense.” “The statement considered in itself is not sufficient to deprecate the honor of the judge of the 10th criminal chamber. One cannot conclude from the defendant’s statement that he wished to hold the judge of the criminal chamber responsible for the alleged bending of the law. By itself, his contention that, the law has been massively bent, on a reasonable evaluation does not show that this reproach was also directed against the judge of the civil chamber as addressee of the letter.”

**Oberlandesgericht, Oldenburg, July 31, 1989, JR 1990, 1217**

The defendant, who was being held on other charges, told two state criminal system employees who were trying to escort her from her cell that they were “shit bulls” (*Scheissbullen*). When they asked her what she had against them, she said that she would kick them in a vulnerable part of their anatomy to which she indelicately referred, and that then they would see what she had against “bulls, state attorneys, and judges.” She was convicted of insult along with other charges and sentenced to two years and three months in prison. On appeal, the *Landgericht* overturned the conviction for insult, sustained her conviction for the other charges, and reduced the sentence to one year and six months. The *Oberlandesgericht* reinstated the conviction for insult.

“This opinion [of the *Landgericht*] is based on the conception that there are no expressions which are simply insulting and that the judge has to examine the meaning of the specific expression under all of the surrounding circumstances to see if the expression in question constituted abuse of another (see Herdegen, LK, 10th edn. no. 18; Schönte/Schröder-Lenckner, *StGB*, 22nd edn. no. 8 to § 185 StrGB with further references). This conception is correct in principle even though with many kinds of expressions, their character as intentionally abusive can be seen more easily than with others. In principle, the observation of the *Landgericht* may also be correct that a general decline in the linguistic culture of people from the social group to which she belonged may have taken away the pejorative significance of the expression ‘bull’ even when used in conjunction with the word ‘shit,’ both in consciousness of this circle of people as well as in the use of language. Moreover, in principle, there is no legal objection when an expression which comes very close to carrying on insulting meaning is to be seen in a particular case as a simple expression of displeasure over, as the *Landgericht* put it, a most unlovable place and a protest against the treatment directed against the speaker and not as the abuse of an individual standing near her.

But these considerations cannot apply here in view of the circumstances in which the statement was made and which are to be used in its interpretation. The employees had gone to the cell of the defendant and explained the purpose for which they came. Thus they stand immediately opposite her. In such a situation, the use of abusive words directed at the class of persons to whom the listeners belong and which, according to their wording do not refer to a general condition or state of affairs, cannot be seen simply as an expression of dissatisfaction . . .

Moreover, the *Landgericht* apparently left out of account that, in answering the question of what she had against them, she threatened a physical mistreatment of both employees which, aside from the feeling of pain attached to it, must normally be regarded as in a certain measure insulting. As to that point, it does not matter whether the defendant began to perform such an act or merely intended to.”

## Chinese Law

### Chinese Civil Code

#### ARTICLE 109

A natural person's personal freedom and dignity is protected by law.

#### ARTICLE 110

A natural person is entitled to the right to life, the right to body, the right to health, the right to one's name, the right to one's image, the right to reputation, the right to honor, the right to privacy and to autonomy in marriage and other rights.

Legal persons and non-legal-person organizations are entitled to the right to their name, the right to reputation, the right to honor, and other rights.

#### ARTICLE 111

Personal information of a natural person shall be protected by law. Any organization or individual that needs to obtain personal information of others shall obtain such information pursuant to the law and ensure the security of the information, and may neither illegally collect, use, process or transmit the personal information of others, nor illegally trade, provide or disclose the personal information of others.

#### ARTICLE 112

The personal rights of a natural person which arise from marriage and family relations shall be protected by law.

**Note.** Under these provisions, in principle, any insult can be civilly actionable. Some have criminal sanctions.

## **b. Problems of Free Speech, Group Insult, and Minority Rights**

### **Law in the United States**

#### **Hustler Magazine v. Falwell, 485 U.S. 46 (1988)**

"The inside front cover of the November 1983 issue of Hustler Magazine featured a 'parody' of an advertisement for Campari Liqueur that contained the name and picture of respondent and was entitled 'Jerry Falwell talks about his first time.' This parody was modeled after actual Campari ads that included interviews with various celebrities about their 'first times.' Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of 'first times.' Copying the form and layout of these Campari ads, Hustler's editors chose respondent as the featured celebrity and drafted an alleged 'interview' with him in which he states that his 'first time' was during a drunken incestuous rendezvous with his mother in an outhouse. The Hustler parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a

hypocrite who preaches only when he is drunk. In small print at the bottom of the page, the ad contains the disclaimer, 'ad parody – not to be taken seriously.' ...

Generally speaking, the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently 'outrageous.' But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment ...

Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures. Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject. Webster's defines a caricature as 'the deliberately distorted picturing or imitating of a person, literary style, etc. by exaggerating features or mannerisms for satirical effect.' Webster's New Unabridged Twentieth Century Dictionary of the English Language 275 (2d ed. 1979). The appeal of the political cartoon or caricature is often based on exploration of unfortunate physical traits or politically embarrassing events – an exploration often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided ...

Several famous examples of this type of intentionally injurious speech were drawn by Thomas Nast, probably the greatest American cartoonist to date, who was associated for many years during the post-Civil War era with Harper's Weekly. In the pages of that publication Nast conducted a graphic vendetta against William M. 'Boss' Tweed and his corrupt associates in New York City's 'Tweed Ring.' ...

Respondent contends, however, that the caricature in question here was so 'outrageous' as to distinguish it from more traditional political cartoons. There is no doubt that the caricature of respondent and his mother published in Hustler is at best a distant cousin of the political cartoons described above, and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description 'outrageous' does not supply one."

**Note on Group Insult and Group Defamation.** One question that will come up in the continental cases is to what extent can one be liable for insulting a group. So far as I know, that question has not arisen in American cases on intentional infliction of emotional distress. But it has in defamation cases. In *Nieman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952), the defendants had published a book which charged that some models and sales women of the Nieman-Marcus store in Texas were "call girls" and that most of the male salesmen were homosexual. Suit was

brought by all nine models who worked at the store, and by thirty out of the 382 saleswomen and by fifteen out of the twenty-five salesmen who worked there. The defendants moved to dismiss the action as to the salesmen and saleswomen (not, apparently, as to the models). The court granted the motion as to the women but not as to the men, noting that the group of men was small and that the allegation concerned “most” of them. In contrast, American courts have consistently refused to allow an action to be brought for defaming a large group such as an ethnic or religious group. See *Khalid Abdullah Tarig Al Mansour Faissal Fahd Al Talal v. Fanning*, 506 F. Supp. 186 (N.D. Cal. 1980) (dismissing a class action on behalf of six hundred million Moslems alleging that a film, “Death of a Princess,” was defamatory to all Moslems).

**Matal v. Tam, 137 S. Ct. 1744 (2017).**

“This case concerns a dance-rock band’s application for federal trademark registration of the band’s name, ‘The Slants.’ ‘Slants’ is a derogatory term for persons of Asian descent, and members of the band are Asian-Americans. But the band members believe that by taking that slur as the name of their group, they will help to ‘reclaim’ the term and drain its denigrating force.

The Patent and Trademark Office (PTO) denied the application based on a provision of federal law prohibiting the registration of trademarks that may ‘disparage ... or bring ... into contempt[t] or disrepute’ any ‘persons, living or dead.’ 15 U.S.C. §1052(a). We now hold that this provision violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend ...

Simon Tam is the lead singer of ‘The Slants.’ In *re Tam*, 808 F. 3d 1321, 1331 (CA Fed. 2015) (en banc), as corrected (Feb. 11, 2016). He chose this moniker in order to ‘reclaim’ and ‘take ownership’ of stereotypes about people of Asian ethnicity. *Ibid.* (internal quotation marks omitted). The group ‘draws inspiration for its lyrics from childhood slurs and mocking nursery rhymes’ and has given its albums names such as ‘The Yellow Album’ and ‘Slanted Eyes, Slanted Hearts.’ *Ibid.*

Tam sought federal registration of ‘THE SLANTS,’ on the principal register, App. 17, but an examining attorney at the PTO rejected the request, applying the PTO’s two-part framework and finding that ‘there is ... a substantial composite of persons who find the term in the applied-for mark offensive.’ *Ibid.*, at 30. The examining attorney relied in part on the fact that ‘numerous dictionaries define “slants” or “slant-eyes” as a derogatory or offensive term.’ *Ibid.*, at 29. The examining attorney also relied on a finding that ‘the band’s name has been found offensive numerous times’ – citing a performance that was canceled because of the band’s moniker and the fact that ‘several bloggers and commenters to articles on the band have indicated that they find the term and the applied-for mark offensive.’ *Ibid.*, at 29–30 ...



Having concluded that the disparagement clause cannot be sustained under our government-speech or subsidy cases or under the Government's proposed 'government-program' doctrine, we must confront a dispute between the parties on the question whether trademarks are commercial speech and are thus subject to the relaxed scrutiny outlined in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of Central Hudson Gas & Electric Corp.*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). The Government and amici supporting its position argue that all trademarks are commercial speech. They note that the central purposes of trademarks are commercial and that federal law regulates trademarks to promote fair and orderly interstate commerce. Tam and his amici, on the other hand, contend that many, if not all, trademarks have an expressive component. In other words, these trademarks do not simply identify the source of a product or service but go on to say something more, either about the product or service or some broader issue. The trademark in this case illustrates this point. The name 'The Slants' not only identifies the band but expresses a view about social issues.

We need not resolve this debate between the parties because the disparagement clause cannot withstand even *Central Hudson* review. Under *Central Hudson*, a restriction of speech must serve 'a substantial interest,' and it must be 'narrowly drawn.' *Ibid.*, at 564–565, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (internal quotation marks omitted). This means, among other things, that '[t]he regulatory technique may extend only as far as the interest it serves.' *Ibid.*, at 565, 115 S. Ct. 2510, 132 L. Ed. 2d 700. The disparagement clause fails this requirement.

It is claimed that the disparagement clause serves two interests. The first is phrased in a variety of ways in the briefs. Echoing language in one of the opinions below, the Government asserts an interest in preventing 'underrepresented groups' from being 'bombarded with demeaning messages in commercial advertising.' Brief for Petitioner 48 (quoting 808 F. 3d, at 1364 (Dyk, J., concurring in part and dissenting in part)). An amicus supporting the Government refers to 'encouraging racial tolerance and protecting the privacy and welfare of individuals.' Brief for Native American Organizations as Amici Curiae 21. But no matter how the point is phrased, its unmistakable thrust is this: The Government has an interest in preventing speech expressing ideas that offend. And, as we have explained, that idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.' *United States v. Schwimmer*, 279 U.S. 644, 655, 49 S. Ct. 448, 73 L. Ed. 889 (1929) (Holmes, J., dissenting).

The second interest asserted is protecting the orderly flow of commerce. See 808 F. 3d, at 1379–1381 (Reyna, J., dissenting); Brief for Petitioner 49; Brief for Native American Organizations as Amicus Curiae 18–21. Commerce, we are told, is disrupted by trademarks that 'involv[e] disparagement of race, gender, ethnicity, national origin, religion, sexual orientation, and similar demographic classification.' 808 F. 3d,

at 1380–1381 (opinion of Reyna, J.). Such trademarks are analogized to discriminatory conduct, which has been recognized to have an adverse effect on commerce. See *ibid.*; Brief for Petitioner 49; Brief for Native American Organizations as Amici Curiae 18–20.

A simple answer to this argument is that the disparagement clause is not ‘narrowly drawn’ to drive out trademarks that support invidious discrimination. The clause reaches any trademark that disparages any person, group, or institution. It applies to trademarks like the following: ‘Down with racists,’ ‘Down with sexists,’ ‘Down with homophobes.’ It is not an anti-discrimination clause; it is a happy-talk clause. In this way, it goes much further than is necessary to serve the interest asserted.

The clause is far too broad in other ways as well. The clause protects every person living or dead as well as every institution. Is it conceivable that commerce would be disrupted by a trademark saying: ‘James Buchanan was a disastrous president’ or ‘Slavery is an evil institution’?

There is also a deeper problem with the argument that commercial speech may be cleansed of any expression likely to cause offense. The commercial market is well stocked with merchandise that disparages prominent figures and groups, and the line between commercial and non-commercial speech is not always clear, as this case illustrates. If affixing the commercial label permits the suppression of any speech that may lead to political or social ‘volatility,’ free speech would be endangered.

For these reasons, we hold that the disparagement clause violates the Free Speech Clause of the First Amendment.”

### French Law

#### **Cour d’appel, Paris, February 15, 1988, JCP 1988.II.21115**

Defendant Francois Brigneau, a journalist, published an article under a pseudonym in a newspaper *Présent* (also a defendant) which contained the following remark about Anne Sinclair, a TV journalist: “As usual, at seven on the hour, sister Sinclair-Levaï, the tart kosher pork butcher received one of her co-religionists. If they wouldn’t talk about anti-semitism, I would like to be transformed into a pillar of salt.” Defendant argued to the *Tribunal de grande instance* that the expression “tart” could be taken as a compliment but in any case was merely banal and vulgar; that the expression “pork butcher” (*charcutière* which means butcher and is usually understood to mean pork butcher) “was in no way insulting, since it referred to the exercise of a profession perfectly worthy of esteem, evoking as well good health, a certain assurance of one’s self”; and that the word “kosher” which “evokes the prohibition of the Jewish religion on eating the meat of pigs, is not incompatible with the trade of a *charautière* which is not limited to the use of this sort of meat, so that the juxtaposition of the words *charcutière* and kosher do not imply any contradiction and therefore cannot make the activity of the person referred to appear aberrational or hypocritical.” The *Tribunal* agreed as to the word “tart” but held that the

other expressions had a “regrettable anti-Semitic connotation” and exceeded the “rights recognized any critic.” It found a violation of Article 29(2) of the Law of July 29, 1881, and instructed the defendants to pay the plaintiff 15,000 francs and to publish an extract from its opinion in its own journal and, again and at their own expense, in a national periodical to be chosen by the plaintiff.

While the case was on appeal, the defendants published another article referring to the plaintiff as a “Christian butcher,” this time using the term *bouchère*, which, unlike *charcutière*, does not connote pork. The plaintiff asked the *Cour d’appel* to affirm the judgment below in principle but to increase the damages to 50,000 francs. The *Cour d’appel* upheld the decision below and awarded 15,000 francs in damages. The court said the expression “kosher,” in this context, had “racist resonance”; that the expression *charcutière* suggested that she sliced up reality like a “sausage”; and that the word “tart” associated with *charcutière* would “lead the reader to represent Mme. Sinclair, physically, as a caricature, and professionally . . . as a journalist triply mediocre: under the aspects of talent, ambition and intellectual honesty.”

In a note on this case, Prof. Agostini said: “In fact, it would appear that the decision in question has condemned an expression for belonging to the category it discussed [‘insult’] which should be called an outrage but is not punishable by the law on the press [the Law of July 29, 1881] . . . .

Now in a democratic society, it must be permitted to anyone to make an evaluation, even a severe one, of those who are makers of opinion and who do not refrain from erecting their own opinions into criteria for public morality. Austria was taken before the European Court of Human Rights because its courts had found that the jurist Lingens committed defamation by ascribing pro-Nazi sympathies to Chancellor Kreisky. The court of Strassburg deemed there had been a violation of article 10 of the Convention which states the principle of freedom of expression.” Agostini, JCP 1988(2).II.21115.

**Note.** The case to which Prof. Agostini referred is *Lingens v. Austria*, European Court of Human Rights, July 8, 1986, Gaz. Pal. 1986(2).Chr. 525. Lingens used the expressions “the most detestable opportunism,” “immoral,” and “deprived of all dignity” to describe Chancellor Kreisky’s tolerance of former Nazis in his government. He was convicted of “defamation.” While truth is a defense to defamation under Austrian law, the defendant has the burden of proving it. The Austrian courts held that this burden had not been met. The European Court of Human Rights held that this decision deprived Lingens of freedom of expression in violation of Article 10 of the European Convention on Human Rights. It said that the Austrian courts “deemed, in substance, that there are different ways of evaluating the conduct of Mr. Kreisky, and if one could not logically prove the justice of one’s own interpretation to the exclusion of any other; as a result, they found the appellant guilty of defamation.”

“In the eyes of the Court, one ought to distinguish between facts and value judgments. If the existence of the first can be proven, the second are not to be put to a proof of their exactitude. The Court observes that the facts on which Mr. Lingens based his value judgment are not in dispute any more than his good faith.”

**Conseil constitutionnelle, June 18, 2020, no. 2020-801 DC.**

12. According to the applications of the provisions of the law that are challenged, the operators of certain on-line platforms whose activity exceed the threshold defined by decree must, under pain of criminal penalties, remove or make inaccessible all the content indicated to them when the content manifestly displays certain unlawful characteristics enumerated by these provisions. These characteristics concern justification of certain crimes, provocation of discrimination, hatred or violence to a person or group of persons on account of their origin or their membership or non-membership in an ethnic group, a nation, a race, or a religion or on account of their sex or their sexual orientation or gender identity or their handicap . . .
13. In adopting these provisions, the legislator wanted to prevent the commission of acts that gravely disturb public order and to avoid the dissemination of statements encouraging such acts. It intended to halt these abuses of the exercise of the freedom of expression which injure public order and the rights of others.
14. Nevertheless, in the first place, the obligation of removal is imposed on an operator when any person has indicated the unlawfulness of the content, his own identity, the location of the content, and the legal reasons for which it is unlawful. The obligation is not subject to a preliminary decision by a judge or subject to any other condition. It is up to the operator, then, to examine all the content that has been indicated to him, however numerous it is, in order to avoid risking a criminal penalty.
15. In the second place, although it is up to the operators of on-line platforms to remove only content that is manifestly unlawful, the legislator has listed many unlawful characteristics that justify the removal of the content. As a result, the operator must examine the content that has been indicated to him with regard to all of these infractions, although the elements that constitute some of them may concern technical points of law or, as may well be the case with wrongs committed by the press, require an evaluation of the context in which they were made or that in which the content in question was disseminated.
16. In the third place, the legislator has required the operators of on-line platforms to fulfill their obligation of removal within a period of twenty-four hours. Taking account of the difficulties just mentioned of evaluating the unlawfulness of the content indicated,

and the risk that there will be many such indications, such a delay is particularly short.

17. In the fourth place, it appears from the legislative history, that, in the last line of paragraph 2 of the new article 6-2, the legislator intended to provide a basis for the exoneration from responsibility for the operators of on-line platforms according to which “the intentional character of the infraction ... can be the absence of an evaluation proportional and necessity given the content of which he was notified.” This provision is not expressed in terms that permit one to determine its scope. No other basis for exoneration is specified or provided to take account, for example, of the receipt of a multiplicity of indications at the same time.
18. Finally, the act of not fulfilling the obligation of removing or making inaccessible content that is manifestly unlawful is punished by a fine of 250,000 euros. Moreover, the penalty is incurred for each instance of a failure to remove and not in the event of repetition.
19. The consequence of what has been said is that ... the provisions challenged can only motivate the operators of on-line platforms to remove content indicated to them whether or not it is manifestly unlawful. They therefore constitute an infraction of the exercise of the freedom of expression and communication which is not necessary, proper and proportionate. Therefore ... paragraph 2 of article 1 is contrary to the Constitution.

**Note.** The French *Conseil constitutionnelle* or Constitutional Council differs from the constitutional courts of other European countries such as Germany and Italy in two ways. First, it is regarded less as a court than as a political body. Its members are appointed short term, and their appointment is regarded as a political decision. Second, it makes its decisions before a statute is enacted when the question of its constitutionality is placed before it by certain members of government. The case above was placed before the Council by a requisite number of senators.

**Cour de cassation, ch. crim., June 28, 1983, pourvoi no. 82-92.904**

The defendant made this statement in a radio broadcast:

The pretended Hitlerian gas chamber and the pretended genocide of the Jews constitute one and the same historical lie which has allowed a gigantic political-financial fraud of which the principal beneficiaries are the state of Israel and international Zionism and the principal victims are the German people, though not their leaders, and the entire people of Palestine.

He was convicted of defamation and sentenced to three months of imprisonment and a 5,000 franc fine. He was also ordered to pay civil damages to the *Ligue internationale contra le racisme et l'antisemitisme* (LICRA) (the International League against Racism and Anti-semitism) which

participated in the proceedings as a civil party (*partie civile*). The *Cour de cassation* upheld the conviction, citing with approval the *Cour d'appel*'s observation that "the entire Jewish community had been represented as a participant in a gigantic fraud from which it was said to have the benefits."

### German Law

#### **Bundesgerichtshof, January 19, 1989, JZ 1989, 644**

This was a criminal case in which the defendant had published an article which stated: "[T]here is hardly any other profession that can be compared to that of a soldier. At most, that of a torturer, concentration camp overseer or executioner. Where else is a person trained to kill as perfectly as possible? . . . A profession whose sole purpose is murder and the maintenance of a gigantic murder machine is, indeed, a morally reproachable profession." Below, the defendant was convicted of "insult" to past and present soldiers of the German army (*Bundeswehr*) and fined. The state prosecutor appealed on the ground that he had also committed "defamation." The *Bundesgerichtshof* held that he was not guilty of defamation, because he had not made any false statements of fact: he had not suggested that soldiers kill except on the battlefield. Then the court said: "The comparative and evaluative statements of the defendant are in principle sufficient to constitute an injury to the honor of the soldiers of the German army (*Bundeswehr*). The *Landgericht* acted appropriately in determining that the undifferentiated comparison quoted expressed contempt for soldiers and that this effect was strengthened by use of the drastic description of the training to kill bound up with the activity of soldiers: for example, with the operation of a 'gigantic murder machine.'

The defendant cannot legally justify his expressions by invoking the basic right to freedom of opinion (Art. 5, par. 1, sent. 1 of the German Constitution (*Grundgesetz*)). Certainly, he is free to discuss critically the public celebration of the oath of the German army and in so doing he may use sharp and polemical expressions and overstated poster-like value judgments (see BVerfGE 24, 278, 286; BVerfGE 42, 163, 169; BGH(Z) NJW 1981, 2117, 2119; Bay ObLG N St.Z 1983, 265), but nevertheless that does not legally justify vituperation, abuse and defaming as is the case here. (See BGH(Z) NJW 1974, 1762, 1763; *id.* 1977, 626, 627; Bay ObLG NStZ 1983, 126; *id.* 1983, 265; OLG Düsseldorf NJW 1986, 1262).

Nevertheless, the limits of culpability were pushed too far when the *Landgericht* held that all former soldiers are to be deemed to be insulted . . .

Certainly, the case law has always recognized that it is possible to insult a number of individual people under a collective description in such a way that all the members of a distinct group of persons are injured by this description. Accordingly a collective insult has been found for the Prussian judiciary (RGR 1, 292), the great landowners except for those with social democratic opinions (RGSt 33, 46, 47), the German officers (RGLZ 1915, 60), the German physicians (RG JW, 1932, 31; *Id.* 13), the Jews living in Germany who were the victims of national socialist measures of



persecution (BGHSt. 11, 207, 208). The capacity to suffer a collective insult was denied for 'all who take part in de-nazification,' the Catholics, the Protestants, the academics (BGHSt. 11, 207, 209), 'the robed men of Moab' (KG JR 1978, 422), the police taken as a whole (OLG Düsseldorf NJW 1981, 1522).

The prior case law recognized that because it must be established which individual persons are insulted, the essential criterion for the possibility of a collective insult is that the group of persons described must be set apart from people in general by specific characteristics so clearly that the circle of those injured is clearly bounded (see, for example, BGHSt. 2, 38, 39; *Id.* 11, 207, 208; RGSt 33, 46, 47).

Nevertheless, the *Reichsgericht* [the predecessor of the *Bundesgerichtshof*] already recognized that the criterion of uncertainty as to the boundary is not sufficient to raise a doubt about injury to those people whose membership in the group is beyond doubt. Indeed, the criterion of a clear boundary is not enough to prevent the finding of a collective insult because in any event criminal penalties would be called for on account of those who undoubtedly did belong to the group of persons referred to (Androulakis, *Die Sammelbeleidigung* 1970, p. 46). But one can always determine who is or is not a Catholic or a member of the *Deutscher Gewerkschaftsbund*.

Accordingly, the absence of clear boundaries to the circle of those injured cannot be the true reason why large groups such as Catholics and Protestants and also women, unionized labor, and employers cannot be collectively insulted. Consequently, the literature has required a further criterion for the recognition of a collective insult: that the group of persons in question be numerically surveyable (*zahlenmässig überschaubar*) (Lenker in Schönke/Schröder, *StGB* 23rd edn., notes before §§ 185ff no. 7; Arzt, JuS 1982, 717, 719; also, in criticism, Androuleakis, *op cit.* p. 63ff, p. 79 ff; Wagner JuS 1978, 674, 677). The starting point for further reflection is that collective insults exaggerate and stereotype. When a collective description concerns an unsurveyable mass of persons and consequently one cannot discover a concrete relationship between the actor's statement or value judgment and particular persons, then what is involved is a generalization which admits of individual exceptions by its very statement. For it is clear that whoever is insulted in general is not insulted. (Herdegen in LK 10th edn. before § 185 no. 22 with reference to BayObLGSt 1958, 34, 35; see Androulakis, *op. cit.* p. 79 ff; Liepemann, *Die Beleidigung*, VDB vol. 4, 1906, p. 217; Wagner JuS 1978, 674, 678.)

The Senate is of the opinion that the size of the insulted group is not a sufficient criterion, together with the ability to find a boundary, to set a limit to collective insult as is required by the rule of law (*aus rechtstaatlichen Gründen*). It is not certain how to find the frontier where a mass that is no longer surveyable is supposed to start. On the contrary, it is correct that a collective insult often contains general value judgments that are not capable of injuring the honor of particular people. With statements such as 'all German doctors are quacks' or 'all German judges bend the law' it is clear that such assertions cannot be true, even in the eyes of the person who

makes them. Thus no one can be considered to be injured absent a tie to some particular person.

Nevertheless, there are pejorative statements about a collectivity to which this objection does not apply. That is the case here. The defendant has bound his pejorative judgment to a criterion that unambiguously does apply to all soldiers because it describes an outer conduct and an objective attachment to the collectivity attacked. One who, as here, compares the profession of a soldier with the activity of concentration camp overseers, executioners and torturers encompasses all soldiers without limitation. The question of to whom the pejorative statement applies does not arise.

The Senate is therefore of the opinion that the defendant ... has insulted all soldiers who, at the time of the publication of his article, were on active service. That is true of reservists only insofar as they found themselves engaged in defense service [citation omitted]. The circle of injured persons thereby identified is certainly large but clearly bounded and to that extent surveyable. Admittedly, one cannot rule out that some active soldiers of the German army – even with defense duties – share the value judgment of the defendant. To that extent there is a consent which excludes the elements necessary for liability.

It is otherwise with regard to former soldiers of the German army. The extent of culpability would then be too wide if only because the necessary charges (*Strafanträge*) have not been brought (StGB § 194 par. 1) ...

Moreover, the circle of former soldiers is so large and unsurveyable that it no longer constitutes a group of persons susceptible of a collective insult. Aside from the fact that some individuals among the former soldiers may share the defendant's opinion, the former soldiers are less affected by his statements because they have no further tie to the army and many have not for decades. Only those former soldiers can be considered as injured parties who still feel themselves tied to the army and manifest this engagement by their conduct, for example, by regular participation in military exercises or participation or work in soldiers' associations.

Nevertheless, there is also a legal objection to the considerations on which the *Landgericht* denied that there was an insult to the German army (*Bundeswehr*).

Under certain circumstances, associations of persons, like individual persons, are susceptible of insult (see, for example, BGHSt. 6, 186 ff with references). For departments, political bodies, and similar positions who attend to the task of public administration that already follows from § 194, par. 3 of the Criminal Code (StGB). Accordingly, the German army is also as an institution capable of suffering an insult. (OLG Hamm NZWehrr 1977, 70 with a note in agreement by Hennings.)

The *Landgericht* made no mistake as to that matter but denied there was an insult because the intention was absent. Its considerations on this point are legally objectionable. Admittedly, interpretation of the publication of the defendant and therefore determining his motive is the task of the judge of the facts (BGHSt. 21, 371, 372; *id.* 32, 310, 311). Considering the textual passages that conflict with it, however, the conclusion that the

article was principally concerned with soldiers and not with their employer is unsatisfactory and cannot be reconciled with them. The occasion on which the article was written – the planned public celebration of the oath of the army in Brückmühl – shows that the direction in which the attack was aimed was at the institution of the army as much as individual soldiers. According, in the foreground were not insulting expressions about individual soldiers, or a number of them, or concrete activities which they had undertaken but abstract considerations about the profession of soldier: its primary purpose murder and the maintenance of a ‘gigantic murder machine.’”

**Note.** In England, courts do not pass on the constitutionality of legislation. In the United States, any court may do so on the theory that the constitution is the highest law of the land. In France, questions of constitutionality may be considered only when legislation is submitted to a special constitutional court in advance by certain government authorities. It may not be considered in the course of ordinary legislation. In Germany, while constitutional questions may not be considered by the ordinary courts, when they arise in the course of litigation, they may be submitted to a special constitutional court, the *Bundesverfassungsgericht*. That is what happened in the following case.

### **Bundesverfassungsgericht, August 28, 1994, NJW 1994, 2943**

During the 1991 Gulf war, a noted conscientious objector displayed a bumper sticker on his car which said, “Soldiers are Murderers.” He was sentenced to pay a fine by two lower courts (an *Amtsgericht* and a *Landgericht*). This sentence was upheld by an intermediate appellate court (*Oberlandesgericht*). The German Constitutional Court (*Bundesverfassungsgericht*) struck it down as a violation of freedom of expression as protected by Article 5 I 1 of the German Constitution (*Grundgesetz*).

“The basic right of freedom of opinion guarantees everyone the right to express his opinion. Each person is allowed to say what he thinks even when he neither gives nor can give any demonstrable grounds for his opinion. (BVerfG 42, 163 [170 f.] = NJW 1976, 1680; BVerfGE 61, 1 [7] = NJW 1983, 1415.) Article 5 I 1 of the German Constitution protects freedom of opinion both in the interest of the development of the individual person, to which it is closely allied, and in the interest of the democratic process, in which it has a constitutive role. (See BVerfGE 7, 198 [208] = NJW 1983, 1145 ...) Moreover, sharp and exaggerated criticism does not deprive an expression of the protection of the Constitution. Still more, value judgments are to be protected by art. 5 I 1 without regard to whether the expression is ‘valuable’ or ‘valueless,’ ‘true’ or ‘false,’ ‘emotional’ or ‘rational.’ (BVerfGE 33, 1 [14 f.] = NJW 1972, 811; BVerfGE 61, 1 [7] = NJW 1983, 1415.)

Nevertheless, the right to freedom of opinion is not protected without reservation. According to art. 5 II of the Constitution, its limits are set by the provisions of general laws which determine by statute the protection of youth and the right to personal honor. However, the provisions that limit the right

itself are to be interpreted in the light of these underlying rights so that a significance reflecting its role can be assigned to the legal sphere of application of the right itself. (See BVerfGE 7, 198 [208] = NJW 1958, 257 ...) Generally, that leads to a weighing in the individual case of freedom of opinion and the status of the legal interests injured by freedom of speech, the result of which in a given case cannot be determined generally and abstractly ...

The *Amtsgericht* and *Landgericht* unanimously presumed that the bumper sticker branded the soldiers of the federal army as the worst criminals and least worthy members of society. But the decisions under attack rest on an understanding of the concept of 'murder' that is oriented to the Criminal Code and conceives the actor as a murderer in the sense of § 211 of that Code, which imposes the highest penalties on such an act. The decisions under attack provide no justification why an intelligent reader of the sticker should understand it in such a specialized and technical sense. In ordinary speech, it is common to make an unspecific use of the terms 'murder' and 'murderer' which goes beyond legal limitations. Accordingly, 'murder' can be understood as any killing of a person which is unjustified and accordingly to be disapproved ...

Consequently, the *Landgericht* gave the expression in question a sense which objectively it did not have."

### **Bundesverfassungsgericht, May 17, 2016 1 BvR 2150/14**

"The complainant objects to a criminal judgment concerning insult (*Beleidigung*).

The complainant attended a football game in Karlsruhe in October 2010. During the game, the complainant together with others in the group of fans held up various large banners. On one was written 'Stuttgart 21 – Police power can strike anyone,' on another, 'Abolish BFE,' where BFE stood for 'Beweis- und Festnahmeeinheit' [a power of arrest of certain German police units]. The complainant and four other persons held up four letters on banners and held them in formation to spell 'A C A B.' Some of the police officials on duty in the stadium felt that their honor (*Ehre*) was injured by these banners since they were an acronym for 'all cops are bastards' [in English].

The decision under review injured the complainant's constitutional right under art. 55(1)(1) of the Constitution.

The criminal judgment of the complainant infringes the constitutional right to the free expression of opinion. The manifestation of the acronym ACAB falls within the area of protection of art. 55(1)(1) of the Constitution. Opinions are to be distinguished factual assertions by the subjective attitude of those who express them to the object toward which they are expressed. They contain a judgment about the condition of things, ideas or persons (BVerfG 93, 266, 289). They are owed the protection of art. 55(1) (1) of the Constitution regardless of whether the expression is evaluated as well founded or unfounded, emotional or rational, worthwhile or worthless, dangerous or harmless (see BVerfG 90, 241, 247; 93, 266, 289; 124, 300, 320).

The courts are correct that the expression 'ACAB' stands for the English words 'all cops are bastards.' ...

The constitutional right to free expression is not protected without reservation but according to art. 5(2) of the constitution underlying it are limitations which are established by general laws and statutory provisions concerning the protection of youth and the law concerning personal honor (*Ehre*). Section 185 of the Criminal code is established as a general law setting limits to the freedom of expression (see BVerfG 93, 266, 290.)

The incursion of the criminal judgment on the freedom of expression is nevertheless unlawful because the constitutional requirements for the application and interpretation of § 185 as a limitation on the freedom of expression are not present.

The task of interpreting and applying criminal law is fundamentally for the expertise of the courts. Nevertheless, statutes which infringe on the freedom of expression must be so interpreted that the principal content of this right in any event is still protected. There is an interchange in the sense that limitations are certainly set by the text of the constitutional right, however they are to be interpreted in the awareness of the underlying significance of this constitutional right in a free democratic state, so that they themselves must be limited in the limitations they set to the constitutional right. (see BVerfG 7, 198, 208f.; BVerfG 93, 266, 292; BVerfG 124, 300, 342.)

The freedom of expression finds its limits in general laws and the rights of third parties protected by them. This is the case when an expression of opinion unlawfully injures the person concerned in his general right to personality (*Persönlichkeit*) or the personal honor which it protects. A disparaging expression that relates neither to definite persons who are named or whose identities are discoverable, but, without any individual distinctions, applies to a collective may under particular circumstances be an attack on the personal honor of the members of the collective. (see BVerfG 93, 266, 299.) The larger the collective is to which the expression relates, the weaker may be the personal disparagement of the individual members, because, in the eyes of the speaker, the reproach to a large collective usually does not concern faulty individual conduct or individual characteristics of the members but the negative value of the collective and its social function insofar as it relates to the conduct required of its members. On an imaginary scale, on one side is the individual outrage of a single person who is named or identifiable, and, on the other side is a disparaging expression merely concerning human characteristics or a criticism of social tendencies or phenomena which are not capable of injuring the personal honor of an individual. (BVerfG 93, 266.) It is constitutionally impermissible to treat an expression directed to the members of a group in general as a sufficiently surveyable (*überschaubar*) group of persons merely because such a group forms a part of a general generically indicated circle of persons. (BVerfG 93, 266, 302.)

The judgment under review cannot be reconciled with these considerations. There is not a sufficient individualization of the negative value

judgment. One cannot find sufficient grounds to conclude that the generally formulated expression relates in the concrete case to a sufficiently surveyable (*überschaubar*) and limited group of persons. It is not enough that the words indicate the police powers of a subgroup of all policemen and policewomen. It is equally insufficient for the constitutional requirement of a personalized reference of the expression that the letters he held up, 'A C A B,' were perceived, and to the knowledge of the claimant would be perceived, by the police present for the security of the football game and concerned with powers of action of the police in the stadium.

A criminal significance of the meaning of the action of the complainant cannot be inferred from the findings of the court which viewed the combination of letters without its wider relationship with other expressions in concerning the powers of action of the police as they would have appeared to those addressed who were in the sports stadium. Rather, the use of the acronym ACAB went along with criticism of the *Beweis- und Festnahmeeinheiten* (BFE) as well as the police preparations in the area of project 'Stuttgart 21' which publicly addressed a much discussed question. From the findings of the court it is not evident that the expression was individualized and directed against definite officials."

### The European Convention on Human Rights

#### ARTICLE 8

- (1). Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2). There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. . . .

#### ARTICLE 10

- (1). Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- (2). The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.



**Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the Right to Privacy**

- (6). The Assembly is aware that personal privacy is often invaded, even in countries with specific legislation to protect it, as people's private lives have become a highly lucrative commodity for certain sectors of the media. The victims are essentially public figures, since details of their private lives serve as a stimulus to sales. At the same time, public figures must recognise that the special position they occupy in society – in many cases by choice – automatically entails increased pressure on their privacy.
- (7). Public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain.
- (8). It is often in the name of a one-sided interpretation of the right to freedom of expression, which is guaranteed in Article 10 of the European Convention on Human Rights, that the media invade people's privacy, claiming that their readers are entitled to know everything about public figures.
- (9). Certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may therefore be legitimate for readers, who are also voters, to be informed of those facts.
- (10). It is therefore necessary to find a way of balancing the exercise of two fundamental rights, both of which are guaranteed by the European Convention on Human Rights: the right to respect for one's private life and the right to freedom of expression.
- (11). The Assembly reaffirms the importance of every person's right to privacy, and of the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value.
- (12). However, the Assembly points out that the right to privacy afforded by Article 8 of the European Convention on Human Rights should not only protect an individual against interference by public authorities, but also against interference by private persons or institutions, including the mass media. . . .
- (14). The Assembly calls upon the governments of the member states to pass legislation, if no such legislation yet exists, guaranteeing the right to privacy containing the following guidelines, or if such legislation already exists, to supplement it with these guidelines:
  - (i). the possibility of taking an action under civil law should be guaranteed, to enable a victim to claim possible damages for invasion of privacy;
  - (ii). editors and journalists should be rendered liable for invasions of privacy by their publications, as they are for libel;

- (iii). when editors have published information that proves to be false, they should be required to publish equally prominent corrections at the request of those concerned;
- (iv). economic penalties should be envisaged for publishing groups which systematically invade people's privacy;
- (v). following or chasing persons to photograph, film or record them, in such a manner that they are prevented from enjoying the normal peace and quiet they expect in their private lives or even such that they are caused actual physical harm, should be prohibited;
- (vi). a civil action (private lawsuit) by the victim should be allowed against a photographer or a person directly involved, where paparazzi have trespassed or used "visual or auditory enhancement devices" to capture recordings that they otherwise could not have captured without trespassing;
- (vii). provision should be made for anyone who knows that information or images relating to his or her private life are about to be disseminated to initiate emergency judicial proceedings, such as summary applications for an interim order or an injunction postponing the dissemination of the information, subject to an assessment by the court as to the merits of the claim of an invasion of privacy;
- (viii). the media should be encouraged to create their own guidelines for publication and to set up an institute with which an individual can lodge complaints of invasion of privacy and demand that a rectification be published.

**E.S. v. Austria, European Court of Human Rights, October 25, 2018 (Application no. 38450/12)**

"3. The applicant complained that her criminal conviction for disparaging religious doctrines (*Herabwürdigung religiöser Lehren*) had violated her right to freedom of expression under Article 10 of the Convention.

...

7. From January 2008 [the applicant] held several seminars entitled 'Basic Information on Islam' (*Grundlagen des Islams*) at the right-wing Freedom Party Education Institute (*Bildungsinstitut der Freiheitlichen Partei Österreichs*). The seminars were open not only to the members of the Freedom Party or invited guests, but were also publicly advertised on its website. In addition, the head of the Freedom Party, H.-C.S., had distributed a leaflet specifically aimed at young voters, advertising them as 'top seminars' in the framework of a 'free education package.' The applicant had not been involved in the selection of participants.

8. Two of the seminars were held on 15 October and 12 November 2009, with around thirty participants at each. One of the participants was an undercover journalist working for a weekly journal, N.
9. At the journal's request, a preliminary investigation was instituted against the applicant, and on 11 February 2010 she was questioned by the police concerning certain statements she had made during the seminars, which had been directed against the doctrines of Islam.
10. On 12 August 2010 the Vienna Public Prosecutor's Office (*Staatsanwaltschaft Wien* – 'the Public Prosecutor') brought charges against the applicant for inciting hatred (*Verhetzung*), pursuant to Article 283 of the Criminal Code. Hearings were held on 23 November 2010, 18 January 2011 and 15 February 2011.
- ...
12. At the end of the hearing on 15 February 2011, the Regional Court ... found her guilty of publicly disparaging an object of veneration of a domestic church or religious society, namely Muhammad, the Prophet of Islam, in a manner capable of arousing justified indignation (*geeignet, berechtigtes Ärgernis zu erregen*).
13. The statements which the court found incriminating were the following:

English translation:

- I. 1. One of the biggest problems we are facing today is that Muhammad is seen as the ideal man, the perfect human, the perfect Muslim. That means that the highest commandment for a male Muslim is to imitate Muhammad, to live his life. This does not happen according to our social standards and laws. Because he was a warlord, he had many women, to put it like this, and liked to do it with children. And according to our standards he was not a perfect human. We have huge problems with that today, that Muslims get into conflict with democracy and our value system ...
2. The most important of all Hadith collections recognised by all legal schools: The most important is the Sahih Al-Bukhari. If a Hadith was quoted after Bukhari, one can be sure that all Muslims will recognise it. And, unfortunately, in Al-Bukhari the thing with Aisha and child sex is written ...
- II. I remember my sister, I have said this several times already, when [S.W.] made her famous statement in Graz, my sister called me and asked: 'For God's sake. Did you tell [S.W.] that?' To which I answered: 'No, it wasn't me, but you can look it up, it's not really a secret.' And her: 'You can't say it like that!' And me: 'A 56-year-old and a six-year-old? What do you call that? Give me an example? What do we call it, if it is not paedophilia?' Her: 'Well, one has to paraphrase it, say it in a more diplomatic way.' My sister is symptomatic. We have heard that so many times. 'Those were different times' – it wasn't okay back then, and it's not okay today. Full stop. And it is still happening today. One can never

approve something like that. They all create their own reality, because the truth is so cruel ...'

14. The Regional Court found that the above statements essentially conveyed the message that Muhammad had had paedophilic tendencies. It stated that the applicant was referring to a marriage which Muhammad had concluded with Aisha, a six-year old, and consummated when she had been nine. The court found that by making the statements the applicant had suggested that Muhammad was not a worthy subject of worship. However, it also found that it could not be established that the applicant had intended to decry all Muslims. She was not suggesting that all Muslims were paedophiles, but was criticising the unreflecting imitation of a role model. According to the court, the common definition of paedophilia was a primary sexual interest in children who had not yet reached puberty. Because paedophilia was behaviour which was ostracised by society and outlawed, it was evident that the applicant's statements were capable of causing indignation. The court concluded that the applicant had intended to wrongfully accuse Muhammad of having paedophilic tendencies. Even though criticising child marriages was justifiable, she had accused a subject of religious worship of having a primary sexual interest in children's bodies, which she had deduced from his marriage with a child, disregarding the notion that the marriage had continued until the Prophet's death, when Aisha had already turned eighteen and had therefore passed the age of puberty. In addition, the court found that because of the public nature of the seminars, which had not been limited to members of the Freedom Party, it was conceivable that at least some of the participants might have been disturbed by the statements.

...

16. The applicant appealed, arguing that the impugned statements were statements of fact, not value judgments. She referred to several of the documents which she had submitted as evidence which, in her view, clearly confirmed that when Muhammad had been fifty-six years old, he had had sexual intercourse with the nine-year-old Aisha. She stated that it was no more than reasonable to present those facts in the light of the values of today's society. It had not been her intention to disparage Muhammad. She had merely criticised the notion that an adult had had sexual intercourse with a nine-year-old child and questioned whether this amounted to paedophilia. If one were to follow the arguments of the Regional Court, it would mean that someone who had married a child and managed to maintain the marriage until the child had come of age could not be described as a paedophile. She further contended that she had not used the term 'paedophile' in the strict scientific sense, but in the way it was used in everyday language, referring to men who had sex with minors. She stated

that she had never said that Muhammad had been a paedophile because he had married a child, but because he had had sexual intercourse with one. In any event, her statements were covered by her rights under Article 10 of the Convention, which included the right to impart opinions and ideas that offend, shock or disturb.

17. On 20 December 2011 the Vienna Court of Appeal (*Oberlandesgericht Wien* – hereinafter ‘the Court of Appeal’) dismissed the applicant’s appeal, confirming in essence the legal and factual findings of the lower court.

...

21. On 11 December 2013 the Supreme Court [*Oberster Gerichtshof*] dismissed the [applicant’s] request for the renewal of the proceedings.

...

32. The applicant alleged that her criminal conviction for disparaging religious doctrines had given rise to a violation of Article 10 of the Convention ...

#### THE COURT’S ASSESSMENT

39. The Court considers, and this was common ground between the parties, that the criminal conviction giving rise to the instant case amounted to an interference with the applicant’s right to freedom of expression. Such interference constitutes a breach of Article 10 unless it is ‘prescribed by law’, pursues one or more of the legitimate aims referred to in paragraph 2 and is ‘necessary in a democratic society’ in order to achieve the aim or aims in question.

(a). ‘Prescribed by law’

40. The Court notes that it was undisputed that the interference had been ‘prescribed by law’, the applicant’s conviction being based on Article 188 of the Criminal Code.

(b). ‘Legitimate aim’

41. While the applicant stressed that her statements had never been aimed at disparaging Muhammad, she did not dispute the legitimate purpose of criminal convictions under Article 188 of the Criminal Code, namely to protect religious peace. The Court endorses the Government’s assessment that the impugned interference pursued the aim of preventing disorder by safeguarding religious peace, as well as protecting religious feelings, which corresponds to protecting the rights of others within the meaning of Article 10 § 2 of the Convention.

(c). ‘Necessary in a democratic society’

(i). General principles

42. The Court reiterates the fundamental principles underlying its judgments relating to Article 10 as set out, for example,

in *Handyside v. the United Kingdom* (7 December 1976, Series A no. 24), and in *Fressoz and Roire v. France* ([GC], no. 29183/95, § 45, ECHR 1999-I). Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. The Court further notes that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see *Baka v. Hungary* [GC], no. 20261/12, § 159, ECHR 2016, and *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 167, ECHR 2017 (extracts)). Those who choose to exercise the freedom to manifest their religion under Article 9 of the Convention, irrespective of whether they do so as members of a religious majority or a minority, therefore cannot expect to be exempt from criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith (see *Otto-Preminger-Institut*, § 47; *İ.A. v. Turkey*, § 28; and *Aydın Tatlav*, § 27, all cited above).

43. As paragraph 2 of Article 10 recognises, however, the exercise of the freedom of expression carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, is the general requirement to ensure the peaceful enjoyment of the rights guaranteed under Article 9 to the holders of such beliefs including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane (see *Sekmadienis Ltd. v. Lithuania*, no. 69317/14, § 74, 30 January 2018, with further references). Where such expressions go beyond the limits of a critical denial of other people's religious beliefs and are likely to incite religious intolerance, for example in the event of an improper or even abusive attack on an object of religious veneration, a State may legitimately consider them to be incompatible with respect for the freedom of thought, conscience and religion and take proportionate restrictive measures (see for example, *mutatis mutandis*, *Otto-Preminger-Institut*, § 47, and *İ.A. v. Turkey*, § 29, both cited above). In addition, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10 of the Convention (see, *mutatis mutandis*, *Gündüz*, cited above, § 51).
- ...
46. The issue before the Court therefore involves weighing up the conflicting interests of the exercise of two fundamental freedoms, namely the right of the applicant to impart to the public her views on religious doctrine on the one hand, and the right of others to respect for their freedom of thought, conscience and religion on the



other (see *Otto-Preminger-Institut*, § 55, and *Aydın Tatlav*, § 26, both cited above).

47. In its case-law the Court has distinguished between statements of fact and value judgments. The classification of a statement as fact or as a value-judgment is a matter which first and foremost falls within the margin of appreciation of the national authorities, in particular the domestic courts (see *Prager and Oberschlick v. Austria*, 26 April 1995, § 36, Series A no. 313). However, the Court can change this classification when exercising its supervisory function (see *Kharmalov v. Russia*, no. 27447/07, § 31, 8 October 2015; *Pinto Pinheiro Marques v. Portugal*, no. 26671/09, § 43, 22 January 2015).
48. In previous cases the Court has emphasised that the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10. However, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive. As the Court has noted in previous cases, the difference lies in the degree of factual proof which has to be established (see *Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001-II; *Feldek v. Slovakia*, no. 29032/95, §§ 73–76, ECHR 2001 VIII; and *Genner v. Austria*, no. 55495/08, § 38, 12 January 2016).
- ...
52. The Court reiterates that a religious group must tolerate the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith, as long as the statements at issue do not incite hatred or religious intolerance. Article 188 of the Criminal Code (see paragraph 24 above) in fact does not incriminate all behaviour that is likely to hurt religious feelings or amounts to blasphemy, but additionally requires that the circumstances of such behaviour were able to arouse justified indignation, therefore aiming at the protection of religious peace and tolerance. The Court notes that the domestic courts extensively explained why they considered that the applicant's statements had been capable of arousing justified indignation, namely that they had not been made in an objective manner aiming at contributing to a debate of public interest, but could only be understood as having been aimed at demonstrating that Muhammad was not a worthy subject of worship (see paragraph 22 above). The Court endorses this assessment.
- ...

56. Lastly, the Court reiterates that the applicant was ordered to pay a moderate fine of only EUR 480 in total for the three statements made, although the Criminal Code alternatively would have provided for up to six months' imprisonment. Furthermore, the fine imposed was on the lower end of the statutory range of punishment of up to 360 day-fines, namely only 120 day-fines, and the domestic courts applied only the minimum day-fine of EUR 4. Though the applicant had no previous criminal record and this was taken into account as a mitigating factor, her repeated infringement had to be considered as an aggravating factor. Under the circumstances, the Court does not consider the criminal sanction as disproportionate.
57. The Court, in conclusion, finds that in the instant case the domestic courts comprehensively assessed the wider context of the applicant's statements, and carefully balanced her right to freedom of expression with the rights of others to have their religious feelings protected, and to have religious peace preserved in Austrian society.  
...
58. Therefore, the Court considers that the domestic courts did not overstep their – wide – margin of appreciation in the instant case when convicting the applicant of disparaging religious doctrines. Accordingly, there has been no violation of Article 10 of the Convention."

### 3. Invasion of Privacy

Privacy can be invaded in many different ways. We will only consider the dissemination of pictures and of true information about the plaintiff.

#### a. Dissemination of Pictures

##### English Law

#### **Kaye v. Robertson, [1991] F.S.R. 62 (C.A.)**

Glidewell L.J. "The Plaintiff, Mr Gordon Kaye, is a well-known actor and the star of a popular television comedy series . . . [After head injuries suffered in an accident], [h]e was then in intensive care until on February 2 he was moved into a private room, forming part of Ward G. at the hospital  
...

The first Defendant is the editor and the second Defendant company is the publisher of *Sunday Sport*, a weekly publication which Mr Justice Potter, from whose decision this is an appeal, described as having 'a lurid and sensational style.' A copy of a recent edition of *Sunday Sport* which was put in evidence before us shows that many of the advertisements contained

in it are for various forms of pornographic material. This indicates the readership it seeks to attract.

Until February 13, 1990, Mr Kaye had not been interviewed since his accident by any representative of a newspaper or television programme. On that day, acting on Mr Robertson's instructions, a journalist and photographer from *Sunday Sport* went to Charing Cross Hospital and gained access to the corridor outside Ward G. They were not intercepted by any of the hospital staff. Ignoring the notices on the door to the ward and on the Plaintiff's door [listing people who were permitted to visit Mr Kaye], they entered the Plaintiff's room. Mr Kaye apparently agreed to talk to them and according to a transcript that we have heard of a taped record they made of what transpired, did not object to them photographing various cards and flowers in his room. In fact, a number of photographs, both in colour and monochrome, were taken of the Plaintiff himself showing the substantial scars to his head amongst other matters. The taking of the photographs involved the use of a flashlight . . .

Medical evidence . . . in this action says that Mr Kaye was in no fit condition to be interviewed or to give any informed consent to be interviewed. The accuracy of this opinion is confirmed by the fact that approximately a quarter-of-an-hour after the representatives of *Sunday Sport* had left his room, Mr Kaye had no recollection of the incident . . .

It is well known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the rights of individuals. In the absence of such a right, Plaintiff's advisers have sought to base their claim to injunctions upon other well-established rights of action."

Because the article the defendants proposed to publish implied that Mr Kaye had consented to give an interview and be photographed, when he was in no fit state to consent, Glidewell held that its publication would constitute libel and malicious falsehood; Bingham, L.J. agreed that it would constitute malicious falsehood. The court granted an injunction restraining the defendants from publishing anything that could be reasonably understood to mean "that the Plaintiff had voluntarily permitted photographs to be taken for publication in that newspaper or had voluntarily permitted representatives of the Defendants to interview him . . . ."

### **Law in the United States**

#### **Restatement (Second) of Torts**

##### **§ 652 D: PUBLICITY GIVEN TO PRIVATE LIFE**

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter published is of a kind that:

- (a). would be highly offensive to a reasonable person, and
- (b). is not of legitimate concern to the public.

**Cape Publications, Inc. v. Bridges, 423 So. 2d 426 (Fla. App. 1982), review denied, 431 So. 2d 988 (Fla. 1983)**

“Appellee Bridges brought suit against appellants on the theories of invasion of privacy, intentional infliction of emotional distress, and trespass, alleging that appellants’ conduct in publishing a photograph of appellee was actionable. The news story reported the abduction of appellee by her estranged husband who came to her workplace and at gunpoint forced her to go with him to their former apartment. The police were alerted and after surrounding the apartment began efforts to free appellee. Her husband forced her to disrobe in an effort to prevent her escape. Her life was obviously in danger. This is a typical exciting emotion-packed drama to which newspeople, and others, are attracted. It is a newsworthy story. Upon hearing a gunshot, the police stormed the apartment and rushed appellee outside to safety. Appellee was clutching a dish towel to her body in order to conceal her nudity as she was escorted to the police car in full public view. The photograph revealed little more than could be seen had appellee been wearing a bikini and somewhat less than some bathing suits seen on the beaches. There were other more revealing photographs taken which were not published. The published photograph is more a depiction of grief, fright, emotional tension and flight than it is an appeal to other sensual appetites.

Although publication of the photograph, which won industry awards, could be considered by some to be in bad taste, the law in Florida seems settled that where one becomes an actor in an occurrence of public interest, it is not an invasion of her right to privacy to publish her photograph with an account of such occurrence.

Just because the story and the photograph may be embarrassing or distressful to the plaintiff does not mean the newspaper cannot publish what is otherwise newsworthy.”

**Howell v. New York Post, Inc., 612 N.E. 2d 699 (N.Y. 1993)**

“In early September 1988, plaintiff Pamela J. Howell was a patient at Four Winds Hospital, a private psychiatric facility in Westchester County. Her complaint and affidavit (accepted as true on this appeal) allege that it was imperative to her recovery that the hospitalization remain a secret from all but her immediate family.

Hedda Nussbaum was also at that time a patient at Four Winds. Nussbaum was the ‘adoptive’ mother of six-year-old Lisa Steinberg, whose November 1987 death from child abuse generated intense public interest ...

On September 1, 1988, a New York Post photographer trespassed onto Four Winds’ secluded grounds and, with a telephoto lens, took outdoor pictures of a group that included Nussbaum and plaintiff. That night, the

hospital's medical director telephoned a Post editor requesting that the paper not publish any patient photographs. Nevertheless, on the front page of next day's edition two photographs appeared – one of Nussbaum taken in November 1987, shortly after her arrest in connection with Lisa's death, and another of Nussbaum walking with plaintiff, taken the previous day at Four Winds.

In the earlier photograph, Nussbaum's face is bruised and disfigured, her lips split and swollen, and her matted hair is covered with a scarf. By contrast, in the photograph taken at Four Winds, Nussbaum's facial wounds have visibly healed, her hair is coiffed, and she is neatly dressed in jeans, a sweater and earrings. Plaintiff, walking alongside her, smiling, is in tennis attire and sneakers. The caption reads: 'The battered face above belongs to the Hedda Nussbaum people remember – the former live-in lover of accused child-killer, Joel Steinberg. The serene woman in jeans at left is the same Hedda, strolling with a companion in the grounds of the upstate psychiatric center where her face and mind are healing from the terrible wounds Steinberg inflicted.' . . .

We have been reluctant to intrude upon reasonable editorial judgments in determining whether there is a real relationship between an article and photograph (Finger, 77 NY2d, at 143; see also, *Gaeta v. New York News*, 62 NY 2d 340, 349). In *Finger*, for example, a magazine without consent used a photograph of plaintiffs and their six children to illustrate a segment about caffeine-enhanced fertility. Although none of the children had been conceived in the manner suggested by the article, we concluded that the requisite nexus between the article and photograph was established because the article's theme – having a large family – was fairly reflected in the picture (See, *Finger*, 77 NY 2d, at 142–143).

In the present case, similarly, plaintiff has failed to meet her burden. The subject of the article was Hedda Nussbaum's physical and emotional recovery from the beatings allegedly inflicted by Joel Steinberg. The photograph of a visibly healed Nussbaum, interacting with her smiling, fashionably clad 'companion' offers a stark contrast to the adjacent photograph of Nussbaum's disfigured face. The visual impact would not have been the same had the Post cropped plaintiff out of the photograph, as she suggests was required. Thus, there is a real relationship between the article and the photograph of plaintiff, and the civil rights cause of action was properly dismissed."

## French Law

### French Civil Code

#### ARTICLE 9

Each person has the right to respect for his private life.

Judges may, without prejudice to compensation for the damage suffered, prescribe all measures, such as sequester, seizure, and others, appropriate to prevent or terminate an incursion on the intimacy of private life . . .

**Note.** When Article 9 was added to the Civil Code, courts were already awarding compensation for violations of another's privacy under Articles 1240–1 (then Articles 1382–3), and they continue to do so.

**Cour de cassation, 1<sup>e</sup> ch. civ., June 10, 1987, pourvoi no. 86–16.85**

Plaintiff was a well-known actress. Defendant was a newspaper that had published a photograph of the plaintiff, her eyes protected by glasses, and her face showing signs of suffering and of the effects of her illness. The photograph had been taken with a telephoto lens. The story said that she could not yet walk and must have long sessions of physical therapy. The defendant pointed out that the story showed good will toward the actress, it said that it used the photograph “to establish the reality or an actual moment or to illustrate.” The plaintiff prevailed before both the *Cour d’appel* and the *Cour de cassation*. The *Cour d’appel* said that use of the picture was unnecessary. The *Cour de cassation* said that it was taken “without the knowledge of the interested parties” and that it showed the actress marked by “suffering and wasting physically.”

**Cour de cassation, 2<sup>e</sup> ch. civ., July 8, 1981, arrêt no. 1.013, pourvoi nos. 80–12.286, 80–13.079**

The defendant, the newspaper *Paris-Match*, published a picture of one of the plaintiffs, a famous singer, in a public place in Paris with a young woman (also a plaintiff) on his arm. The newspaper did not say or suggest anything about their relationship. The *Cour de cassation* held that the plaintiffs could recover. It noted that two of the five photographs in question had been taken in what it called a “private place” although it did not describe the location. It said that “if the publication of photographs of a public figure (*personne publique*) even without his express authorization does not constitute, in principle, an injury to his right to his image, that is only upon condition that the photographs in question concern exclusively his profession and not his private life . . . and, finally, if the reproduction of the image of a public figure in the conduct of his professional life is not, in principle, subject to obtaining his express permission nevertheless it is necessary that the interested party be considered as having tacitly authorized the reproduction of his image.” Here, the court said, by his past conduct Jacques Brel “manifested an evident desire to be extremely discrete.”

## German Law

### Law Concerning the Right of Authors to Works of Pictorial Art and Photography (abbreviated KunstUrhG for Kunst Urheber Gesetz)

#### § 22. RIGHT TO ONE’S OWN IMAGE

Images shall be disseminated or publicly displayed only with the consent of the person portrayed. In cases of doubt, consent is deemed to have been given when the person portrayed accepts payment to allow



himself to be portrayed. For ten years after the death of the person portrayed, the consent of his relatives is necessary. Relatives in this sense include the surviving wife and children of the person portrayed, and, if neither the wife nor children are available, the parents of the person portrayed.

#### § 23. EXCEPTIONS TO § 22

- (1). It is permitted to disseminate or to publicly display without the consent required by § 22:
  1. Images in the area of contemporary history; . . .
  2. Images in which the people appear only as an incident in a landscape or similar locale;
  3. Images of gatherings, processions, and similar events in which the person in question was a participant;
  4. Images that are not made upon order insofar as their dissemination or display serves an important artistic interest.
- (2). Nevertheless, this authority does not extend to a dissemination and display by which a legitimate interest of the person portrayed is violated, or, in the event of his death, the interest of his relatives.

#### § 24: EXCEPTIONS IN THE PUBLIC INTEREST

Public officials may duplicate, disseminate or publicly display images for purposes of the administration of justice and public security without the consent of the person entitled, that is, the person portrayed or his relatives.

### **Bundesgerichtshof, January 15, 1965, 1965 NJW 1374**

“The appellate court saw a violation of the general right of personality of the plaintiff (Civil Code § 823(1)) and of his right to his own image (KunstUrhG § 22) in the publication of a picture of the plaintiff together with its caption and accompanying text. It found that the use of the picture along with the text was sufficient to lower the human dignity of the plaintiff in two ways. First, he was pointed out as the example and prototype of the ‘satisfied German’ by the caption. Second, the accompanying text created the possibility that the hasty reader would transfer to the plaintiff the enumeration of the outer characteristics of the former SS General Wolff which was to be found immediately next to the plaintiff’s picture, and so get the impression that the person pictured was SS General Wolff. The unwary reader was particularly likely to do so because the nearby description of Wolff also fit the plaintiff . . .

The appeal (*Revision*) erroneously contends that the result [below] cannot be reconciled with the claim proven by the defendant that the plaintiff consented to the taking and the publication of the picture. The appellate court found that he did give consent but that, nevertheless, according to the defendant’s own statement, the consent was not to the manner and kind of the publication of the picture together with its demeaning caption and in proximity to an article about former SS General Wolff.

That decision is in harmony with the case law. According to it, the question of what kind of publication of an image is covered by the authorization of the person pictured that is not expressly limited is to be answered by interpreting what he said in giving permission, taking into consideration the circumstances of the particular case (BGHZ 20, 345 = NJW 56, 1554; BGH GRUR 1962, 211 f. = LM no. 5 to § 23 KunstUrhG). Where, as here, no payment was made for the picture, the burden of proving the consent and its *scope* falls on the person who is claimed to have violated the right to one's own image (BGHZ, op. cit. 348) ...

The appeal claims ... [that] internationally and generally, modern photo journalism maintains the position that is permissible, and not a violation to the right to one's own image, to take street pictures of people who are visible to the journalist in their everyday appearance. It answers to our experience of life, and corresponds to our convictions, that photo journalists are allowed to take and to use pictures of people for purposes of social criticism ...

We can leave aside the question of whether, as to appeal claims, there has been a change in the views held generally of the authority of photo journalists ... For the freedom to publish a picture without the consent of the person pictured under § 23(1) KunstUrhG does not extend, according to § 23(2), to the publication of pictures that violate a legitimate interest of the person pictured. In answering this question, the publication of the picture in its totality is to be evaluated, and not in isolation from its accompanying text (BGHZ 20, 346, 350f = NJW 56, 1554; BGHZ 24, 201, 209 = NJW 57, 1315 (late homecomer); BGH GRVR 1962, 212 no. 4 (wedding picture); id. 1962, 324 = NJW 62, 1004 (double murder)). As explained, the appellate court did not commit legal error in finding that the manner and kind of the publication of plaintiff's picture by defendant violated his legitimate interest."

### **Bundesgerichtshof, December 19, 1995, BGHZ 131, 332**

[In this, and the two cases that follow, Princess Caroline of Monaco claimed that her right to privacy had been violated by the publication of three types of photographs by various German publishers: (1) photos show her with the actor Vincent Lindon at the far end of a restaurant courtyard in Saint-Rémy-de-Provence. The magazine referred to them as "the tenderest photos of her romance with Vincent"; photos bore the caption, "these photos are evidence of the tenderest romance of our time"; (2) photographs of Princess Caroline in public with her children; and (3) photographs showing the applicant in public on horseback, shopping on her own, eating with Mr. Lindon in a restaurant, riding alone on a bicycle, and with her bodyguard at a market, in public on a skiing holiday in Austria, accompanying Prince Ernst August von Hannover, alone leaving her Parisian residence, playing tennis with Prince Ernst August von Hannover and putting their bicycles down, and a photograph of Princess Caroline tripping over an obstacle at the Monte Carlo Beach Club.]

“Pictures that fall within the history of the times can be circulated and displayed without consent of the person affected unless the legitimate interest of the person depicted is thereby injured (§§ 23 (1)(2) of the Law Concerning the Right of Authors (*Urhebergesetz*)).

To history of the times belong all pictures of persons who belong to the history of the times, and in particular, all persons who are to be regarded as part of that history. The plaintiff belongs to this class of person ...

For a person to be classified as belonging to the history of the times, the criterion is that the picture made public is significant and the attention paid to the person in question has value so that the public has a legitimate interest in clear information and the pictorial presentation of it is to be approved [many citations omitted]. Those who clearly belong to this category include monarchs, leading state officials and politicians. [Citations omitted to cases involving Kaiser Wilhelm II, Reich President Ebert, Reichminister Noske, and the Chancellor of the Federal Republic] ...

Nevertheless, the use of pictures of persons belonging to the history of the times without their consent is not without its limits ... [I]t must be determined, by a weighing of values and interests in the individual case, whether the interest of the public in information, protected by the freedom of the press (art. 5 of the Constitution), to which the defendant can appeal should be placed above the interest in the right to personality for which the plaintiff can claim protection (art. 2 of the Constitution).

The appellate court recognized these principles. Only, it thought that legitimate public interest ends with the house door of the person affected ...

A person belonging to the history of our times can, as anyone else ... reserve a place outside his own home for himself or at least from which the larger public is excluded.

That may, for example, be in an exclusive part of a restaurant or hotel, sports box, telephone booth, or under some circumstances even in open nature, so far as it does not appear to the person affected as a public place.

[On these grounds, the court ruled that the defendant could not publish the photographs taken in the secluded portion of the restaurant. It held that the publication of the other photographs was legitimate.]

Photographs can be taken in places which are accessible to anyone. In such cases, the plaintiff has entered these public places and so become part of the public. ...

Nor can she prohibit the publication of these pictures. She must as a person who belongs to the history of our times accept that the public has a legitimate interest in knowing how she behaves what she does in public place, whether it is buying in the market, or in a café, or in athletic activities, or in the ordinary activities of her own life.

It is common to all these pictures that they do not portray the plaintiff taking part in an official function but concern private life in the larger sense. The plaintiff would like the publication of such pictures to be

prohibited in Germany as it is in France. In Germany, however, that is not possible.

In France the publication of such pictures is permissible in principle only with the permission of the person depicted according to Article 9 of the *Code civil* which concerns the protection of private life (*vie privée*). That provision applies to monarchs and other persons in public life unless the person concerned is engaged in the exercise of their official function. (See Cour de cassation, Bulletin des arrêts, Chambres civiles, April 1988, 1 ch. civ. No. 98 p. 67 ...) ...

German law is not applied in that way ...”

**Note.** For Articles 1, 2 and 5 of the German Constitution, protecting dignity, privacy, and freedom of expression, see pp. 324–325.

### **Bundesverfassungsgericht, December 15, 1999, BVerfG 101, 361**

[Translation of this portion of the opinion was taken from the decision of the European Court of Human Rights, below. The facts of this case appear in the previous decision of the *Bundesgerichtshof*. The court agreed that Princess Caroline was a “figure of contemporary society.”]

“General personality rights do not require publications that are not subject to prior consent to be limited to pictures of figures of contemporary society in the exercise of their function in society. Very often the public interest aroused by such figures does not relate exclusively to the exercise of their function in the strict sense. It can, on the contrary, by virtue of the particular function and its impact, extend to information about the way in which these figures behave generally – that is, also outside their function – in public. The public has a legitimate interest in being allowed to judge whether the personal behaviour of the individuals in question, who are often regarded as idols or role models, convincingly tallies with their behaviour on their official engagements.

If, on the other hand, the right to publish pictures of people considered to be figures of contemporary society were to be limited to their official functions, insufficient account would be taken of the public interest properly aroused by such figures and this would, moreover, favour a selective presentation that would deprive the public of certain necessary judgmental possibilities in respect of figures of socio-political life, having regard to the function of role model of such figures and the influence they exert ...

According to the decision being appealed, the privacy meriting protection that must also be afforded to figures of contemporary society *par excellence* presupposes that they have retired to a secluded place with the objectively perceptible aim of being alone and in which, confident of being alone, they behave differently from how they would behave in public ...

The criterion of a secluded place takes account of the aim, pursued by the general right to protection of personality rights, of allowing the

individual a sphere, including outside the home, in which he does not feel himself to be the subject of permanent public attention – and relieves him of the obligation of behaving accordingly – and in which he can relax and enjoy some peace and quiet. This criterion does not excessively restrict press freedom because it does not impose a blanket ban on pictures of the daily or private life of figures of contemporary society, but allows them to be shown where they have appeared in public. In the event of an overriding public interest in being informed, the freedom of the press can even, in accordance with that case-law authority, be given priority over the protection of the private sphere ...

The *Bundesgerichtshof* properly held that it is legitimate to draw conclusions from the behaviour adopted in a given situation by an individual who is clearly in a secluded spot. However, the protection against dissemination of photos taken in that context does not only apply where the individual behaves in a manner in which he would not behave in public. On the contrary, the development of the personality cannot be properly protected unless, irrespective of their behaviour, the individual has a space in which he or she can relax without having to tolerate the presence of photographers or cameramen. That is not in issue here, however, since, according to the findings on which the *Bundesgerichtshof* based its decision, the first of the conditions to which protection of private life is subject has not been met.

Lastly, there is nothing unconstitutional, when balancing the public interest in being informed against the protection of private life, in attaching importance to the method used to obtain the information in question ... It is doubtful, however, that the mere fact of photographing the person secretly or catching them unawares can be deemed to infringe their privacy outside the home. Having regard to the function attributed to that privacy under constitutional law and to the fact that it is usually impossible to determine from a photo whether the person has been photographed secretly or caught unawares, the existence of unlawful interference with that privacy cannot in any case be made out merely because the photo was taken in those conditions. As, however, the *Bundesgerichtshof* has already established in respect of the photographs in question that the appellant was not in a secluded place, the doubts expressed above have no bearing on the review of its decision.

(cc) However, the constitutional requirements have not been satisfied insofar as the decisions of which the appellant complains did not take account of the fact that the right to protection of personality rights of a person in the appellant's situation is strengthened by section 6 of the Basic Law [i.e. the German Constitution] regarding that person's intimate relations with their children.

(dd) The following conclusions can be drawn from the foregoing considerations with regard to the photographs in question.

The decision of the *Bundesgerichtshof* cannot be criticised under constitutional law regarding the photos of the appellant at a market, doing her market shopping accompanied by her bodyguard or dining with a male

companion at a well-attended restaurant. The first two cases concerned an open location frequented by the general public. The third case admittedly concerned a well circumscribed location, spatially speaking, but one in which the appellant was exposed to the other people present.

It is for this reason, moreover, that the *Bundesgerichtshof* deemed it legitimate to ban photos showing the applicant in a restaurant garden, which were the subject of the decision being appealed but are not the subject of the constitutional appeal. The presence of the applicant and her companion there presented all the features of seclusion. The fact that the photographs in question were evidently taken from a distance shows that the applicant could legitimately have assumed that she was not exposed to public view.

Nor can the decision being appealed be criticised regarding the photos of the applicant alone on horseback or riding a bicycle. In the *Bundesgerichtshof's* view, the appellant had not been in a secluded place, but in a public one. That finding cannot attract criticism under constitutional law. The applicant herself describes the photos in question as belonging to the intimacy of her private sphere merely because they manifest her desire to be alone. In accordance with the criteria set out above, the mere desire of the person concerned is not relevant in any way.

The three photos of the applicant with her children require a fresh examination, however, in the light of the constitutional rules set out above. We cannot rule out the possibility that the review that needs to be carried out in the light of the relevant criteria will lead to a different result for one or other or all the photos. The decision must therefore be set aside in that respect and remitted to the *Bundesgerichtshof* for a fresh decision.”

**Von Hannover v. Germany, European Court of Human Rights,  
June 24, 2004 (Application no. 59320/00)**

[For the facts of this case, see the two preceding German decisions.]

“(48). The Court notes at the outset that the photos of the applicant with her children are no longer the subject of this application, as it stated in its admissibility decision of 8 July 2003.

The same applies to the photos published in *Freizeit Revue* magazine (edition no. 30 of 22 July 1993) showing the applicant with Vincent Lindon at the far end of a restaurant courtyard in Saint-Rémy-de-Provence (see paragraph 11 above). In its judgment of 19 December 1995 the *Bundesgerichtshof* prohibited any further publication of the photos on the ground that they infringed the applicant’s right to respect for her private life (see paragraph 23 above).

...

(56). In the present case the applicant did not complain of an action by the State, but rather of the lack of adequate State protection of her private life and her image.



(57). The Court reiterates that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see, *mutatis mutandis*, *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 23; *Stjerna v. Finland*, judgment of 25 November 1994, Series A no. 299-B, p. 61, § 38; and *Verliere v. Switzerland* (dec.), no. 41953/98, ECHR 2001-VII). That also applies to the protection of a person's picture against abuse by others (see *Schüssel*, cited above).

...

(60). In the cases in which the Court has had to balance the protection of private life against the freedom of expression it has always stressed the contribution made by photos or articles in the press to a debate of general interest (see, as a recent authority, *News Verlags GmbH & CoKG v. Austria*, no. 31457/96, § 52 et seq., ECHR 2000-I, and *Krone Verlag GmbH & Co. KG v. Austria*, no. 34315/96, § 33 et seq., 26 February 2002). The Court thus found, in one case, that the use of certain terms in relation to an individual's private life was not 'justified by considerations of public concern' and that those terms did not '[bear] on a matter of general importance' (see *Tammer*, cited above, § 68) and went on to hold that there had not been a violation of Article 10. In another case, however, the Court attached particular importance to the fact that the subject in question was a news item of 'major public concern' and that the published photographs 'did not disclose any details of [the] private life' of the person in question (see *Krone Verlag*, cited above, § 37) and held that there had been a violation of Article 10. Similarly, in a recent case concerning the publication by President Mitterand's former private doctor of a book containing revelations about the President's state of health, the Court held that 'the more time passed the more the public interest in President Mitterand's two seven-year presidential terms prevailed over the requirements of the protection of his rights with regard to medical confidentiality' (see *Plon (Société) v. France*, no. 58148/00, 18 May 2004) and held that there had been a breach of Article 10.

(61). The Court points out at the outset that in the present case the photos of the applicant in the various German magazines show her in scenes from her daily life, thus engaged in activities of a purely private nature such as practising sport, out walking, leaving a restaurant or on holiday ...

(62). The Court also notes that the applicant, as a member of the Prince of Monaco's family, represents the ruling family at certain cultural

or charitable events. However, she does not exercise any function within or on behalf of the State of Monaco or one of its institutions.

(63). The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of ‘watchdog’ in a democracy by contributing to ‘impart[ing] information and ideas on matters of public interest’ (*Observer and Guardian*, cited above, *ibid.*) it does not do so in the latter case.

(64). Similarly, although the public has a right to be informed, which is an essential right in a democratic society that, in certain special circumstances, can even extend to aspects of the private life of public figures, particularly where politicians are concerned (see *Plon (Société)*, cited above, *ibid.*), this is not the case here. The situation here does not come within the sphere of any political or public debate because the published photos and accompanying commentaries relate exclusively to details of the applicant’s private life.

(65). As in other similar cases it has examined, the Court considers that the publication of the photos and articles in question, of which the sole purpose was to satisfy the curiosity of a particular readership regarding the details of the applicant’s private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public (see, *mutatis mutandis*, *Jaime Campmany y Díez de Revenga and Juan Luís Lopez-Galiacho Perona v. Spain* (dec.), no. 54224/00, 12 December 2000; *Julio Bou Gibert and El Hogar Y La Moda J.A. v. Spain* (dec.), no. 14929/02, 13 May 2003; and *Prisma Presse*, cited above).

(66). In these conditions freedom of expression calls for a narrower interpretation (see *Prisma Presse*, cited above, and, by converse implication, *Krone Verlag*, cited above, § 37).

(67). In that connection the Court also takes account of the resolution of the Parliamentary Assembly of the Council of Europe on the right to privacy, which stresses the ‘one-sided interpretation of the right to freedom of expression’ by certain media which attempt to justify an infringement of the rights protected by Article 8 of the Convention by claiming that ‘their readers are entitled to know everything about public figures’ (see paragraph 42 above, and *Prisma Presse*, cited above).

...

(74). The Court therefore considers that the criteria on which the domestic courts based their decisions were not sufficient to protect the applicant’s private life effectively. As a figure of contemporary society ‘*par excellence*’ she cannot – in the name of freedom of the press and the public interest – rely on protection of her private life unless she is in a

secluded place out of the public eye and, moreover, succeeds in proving it (which can be difficult). Where that is not the case, she has to accept that she might be photographed at almost any time, systematically, and that the photos are then very widely disseminated even if, as was the case here, the photos and accompanying articles relate exclusively to details of her private life.

(75). In the Court's view, the criterion of spatial isolation, although apposite in theory, is in reality too vague and difficult for the person concerned to determine in advance. In the present case merely classifying the applicant as a figure of contemporary society '*par excellence*' does not suffice to justify such an intrusion into her private life.

(76). As the Court has stated above, it considers that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution since the applicant exercises no official function and the photos and articles related exclusively to details of her private life.

(77). Furthermore, the Court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public.

Even if such a public interest exists, as does a commercial interest of the magazines in publishing these photos and these articles, in the instant case those interests must, in the Court's view, yield to the applicant's right to the effective protection of her private life.

(78). Lastly, in the Court's opinion the criteria established by the domestic courts were not sufficient to ensure the effective protection of the applicant's private life and she should, in the circumstances of the case, have had a 'legitimate expectation' of protection of her private life.

(79). Having regard to all the foregoing factors, and despite the margin of appreciation afforded to the State in this area, the Court considers that the German courts did not strike a fair balance between the competing interests.

(80). There has therefore been a breach of Article 8 of the Convention."

**Note.** When Princess Caroline won before the *Bundesgerichtshof* and the *Bundesverfassungsgericht*, she could take it for granted that their decisions would be enforced in Germany. It is not so of the decision in her favor of the European Court of Human Rights, which has only such force as German authorities choose to give it. If they give it no effect at all, however, Germany is subject to sanctions.

## Chinese Law

### Chinese Civil Code

#### ARTICLE 111

Personal information of a natural person shall be protected by law. Any organization or individual that needs to obtain personal information of others shall obtain such information pursuant to the law and ensure the security of the information, and may neither illegally collect, use, process or transmit the personal information of others, nor illegally trade, provide or disclose the personal information of others.

Natural persons enjoy right to privacy. No organization or individual shall harm other's right to privacy by way of prying, harassing, leaking and publicizing.

Privacy is natural person's right to peaceful life (right to be left alone) and private space, private activities and private information that one does not wish others to know.

#### **Huang v. V3 International Sports, LLC (2017)赣03民终240号 (2017) Gan 03 Min Zhong No. 240**

Plaintiff, Huang, purchased gym membership and signed up for private sessions with defendant, V3 Sports in Feb. 2016. Wechat is a popular social media software in China where users can share pictures and stories in the "moments" that can only be seen by people in their Wechat friends group. Half a year later in September, plaintiff posted a set of nine contrasting pictures of himself from both before and after he joined the gym boasting about his success in weight loss. In these pictures, one can also see his then pregnant wife and one-year-old son. Two weeks later, he received a tip from his friend that one of his Wechat friends, a sales consultant, Yang, from defendant's company, apparently used the pictures in the marketing materials. Yang widely disseminated a set of four pictures of the plaintiff on Wechat along with a following message: "it is better to prove yourself a warrior than try to come up a thousand excuses to prove that you are not a coward. This is the hard evidence of perseverance. It is time to act. Join V3 now. Please contact Yang at this phone number . . ." It turned out the private trainer of Huang was his Wechat friend who saw the pictures and forwarded these to V3 internal chat group as part of internal work-related discussions. The sales people used these pictures for the online marketing campaign. Plaintiff sued to recover damage from infringement of right of privacy and right to image.

The Anyuan district court of Pingxiang municipality reasoned that the publication of pictures by plaintiff via Moments on Wechat showed his intention to limit the dissemination of such pictures as only a limited number of people would have had access to them. Constructive consent of plaintiff for defendant to disseminate the pictures cannot be established. Defendant was at fault in widely disseminating the pictures without consent. Their intention to profit from such pictures was self-evident.

Plaintiff's claims were supported by the court and V3 was ordered to issue an apology via its official Wechat account. V3 was also held liable to compensate the plaintiff for 500 yuan in economic loss and 1,000 yuan for mental distress.

**Li et al. v. Yeji County Policy Department, Anhui Provincial TV Channel, Yeji High School** 李海峰 诉叶集公安局等侵犯名誉权、肖像权纠纷案 (citation unavailable)

Six male high schooler students were asked by the school to assist in the investigation of an attempted rape case that occurred on campus. At the school's request, they participated in a police line up alongside the criminal suspect because they were roughly of the same age, height and figure of the suspect. They were lined, each holding a number for the victim to identify the suspect. The Anhui Provincial TV Channel reported the incident. Police gave them the videotape of the lineup without telling them to pixelate their faces. Police aired the tape in its entirety without pixelating the face of the six students. They did blur the face of the real suspect. After the program was aired, the boys soon became the subjects of public outrage and were called "rapists" or "criminal suspects" at school. Their educational experience was greatly affected and their families suffered great mental distress. They brought suit against the school, TV channel, and the police department for infringement over their right of reputation and right to their image. The claim for harm to reputation was upheld by both trial court and appellate court against TV Channel and Police Department. The school was found not liable. The claim for right to their image was denied.

All three defendants raised the defense that they were not at fault in causing this particular harm because it was not intentional, and they did not act with malice in arranging for the boys to participate in the line up or reporting the incident. The court held that the school was not at fault but the other two defendants were. Fault, according to both courts, includes intention and negligence. Even though TV Channel and Police Department did not intentionally mishandle the situation they were clearly negligent. The Police Department did not fulfill its duty to protect the plaintiff's legitimate interest by failing to warn TV Channel to pixelate the faces. TV Channel was negligent in only pixelating the face of the criminal suspect but not the plaintiffs'. The news also did not clarify the situation by describing the nature of the line up. Such an exposure resulted in a misunderstanding and a wide range of negative publicity affecting plaintiffs' reputation. They were soon labeled as "rapists" and the social perception of them was substantially lowered. Consequently, their reputation was harmed. The award of damage must be proportional to the scope of the negative publicity. RMB 36,000 yuan was awarded them instead of RMB 600,000 yuan which they claimed.

The appellate court, Hefei Intermediate Court, held that "[h]arm to right of to one's image requires the use of one's image without consent with the intention to profit. Since the only intention here was to report the news,

the mental element of harm to right of image cannot be established." The claim for right of image was denied.

## **b. Dissemination of True Information**

### **i. About Current Events**

#### **English Law**

#### **Stephens v. Avery, [1988] 1 Ch. 457**

Sir Nicolas Browne-Wilkinson V.-C. "This is an application to strike out a statement of claim on the ground that it discloses no cause of action or, alternatively, on the ground that the claim is frivolous and vexatious. The action is brought by Mrs Stephens as plaintiff against three defendants. The first defendant is Mrs Avery to whom it is alleged she communicated certain information in confidence, the second defendant is the editor and the third defendant, Mail Newspapers plc, the publishers of the Mail on Sunday. Broadly, the ambit of the claim is that Mrs Stephens alleges that information communicated in confidence to Mrs Avery was communicated by Mrs Avery to the second and third defendants, and published in the Mail on Sunday in breach of the duty of confidence. The master refused to strike out the claim, and the defendants appeal to this court.

The background facts are lurid. The action is connected with the unlawful killing of a Mrs Telling by her husband. The trial of Mr Telling received much publicity in the press. It led to Mr Telling's conviction for manslaughter . . .

The information disclosed by the plaintiff to Mrs Avery and alleged to have been disclosed by Mrs Avery to the newspaper and published by the newspaper related to the sexual conduct of the plaintiff. In particular, it related to a lesbian relationship between the plaintiff and Mrs Telling. For the first time it identified the plaintiff as the woman whom Mr Telling alleged at his trial he had discovered in a compromising position with his wife. The plaintiff was not called at the trial . . .

Three requirements have to be satisfied before a court will protect information as being legally confidential. They were laid down by the Court of Appeal in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) [1963] 3 All ER 413 and were summarised by Megarry J in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47 in this way:

In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the *Saltman* case (at 215), must 'have the necessary quality of confidence about it.' Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.

Counsel for the defendants submits that in the absence of either a legally enforceable contract or a pre-existing relationship, such as that of employer and employee, doctor and patient, or priest and penitent, it is



not possible to impose a legal duty of confidence on the recipient of the information merely by saying that the information is given in confidence. In my judgment that is wrong in law. The basis of equitable intervention to protect confidentiality is that it is unconscionable for a person who has received information on the basis that it is confidential subsequently to reveal that information. Although the relationship between the parties is often important in cases where it is said there is an implied as opposed to express obligation of confidence, the relationship between the parties is not the determining factor. It is the acceptance of the information on the basis that it will be kept secret that affects the conscience of the recipient of the information . . .

To my mind this case undoubtedly does raise fundamental difficulties as to the relationship between on the one hand the privacy which every individual is entitled to expect, and on the other hand freedom of information. To many, the aggressive intrusion of sectors of the press into the private lives of individuals is unpalatable. On the other hand, the ability of the press to obtain and publish for the public benefit information of genuine public interest, as opposed to general public titillation, may be impaired if information obtained in confidence is too widely protected by the law. Moreover, is the press to be liable in damages for printing what is true? I express no view as to where or how the borderline should be drawn in such a case. On any footing, such a point of law is in my judgment wholly unsuited for determination on a striking out application. The point requires the most accurate formulation and analysis. It is not the subject matter of existing decision directly in point and, therefore, it is in my view, a matter to be determined at trial.”

**Note.** Reread the European Convention on Human Rights, Articles 8 and 10, above pp. 340–342.

### **Human Rights Act 1998, ch. 42**

6. – (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

- (2). Subsection (1) does not apply to an act if
  - (a). as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
  - (b). in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
- (3). In this section “public authority” includes–
  - (a). a court or tribunal, and
  - (b). any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

**Campbell v. MGN Ltd., [2004] UKHL 22**

The plaintiff, Naomi Campbell, was a celebrated fashion model. The defendant, the newspaper *Mirror*, ran an article describing her as a drug addict who “is attending Narcotics Anonymous meetings in a courageous attempt to beat her addiction to drink and drugs.” The article was accompanied by a photograph of her attending a Narcotics Anonymous meeting. In a divided opinion, the House of Lords held the defendant liable. Both the majority and the minority agreed, however, that, in principle, she had a right of action if the newspaper revealed too much. Both the majority and minority also agreed that the newspaper did not violate this right by revealing that she was a drug addict since she had publicly stated she was not, and the newspaper had a right to set the record straight. The majority, however, believed that the newspaper had disclosed more than necessary to accomplish this purpose.

The reason she would otherwise have had an action is explained in this opinion by Lord Nicholls who held for the defendant.

**Lord Nicholls of Birkenhead.**

“Breach of confidence: misuse of private information

11. In this country, unlike the United States of America, there is no over-arching, all-embracing cause of action for ‘invasion of privacy’: see *Wainwright v Home Office* [2003] 3 WLR 1137. But protection of various aspects of privacy is a fast developing area of the law, here and in some other common law jurisdictions. The recent decision of the Court of Appeal of New Zealand in *Hosking v Runting* (25 March 2004) is an example of this. In this country development of the law has been spurred by enactment of the Human Rights Act 1998.
12. The present case concerns one aspect of invasion of privacy: wrongful disclosure of private information. The case involves the familiar competition between freedom of expression and respect for an individual’s privacy. Both are vitally important rights. Neither has precedence over the other. The importance of freedom of expression has been stressed often and eloquently, the importance of privacy less so. But it, too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual. And restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state: see La Forest J in *R v Dymont* [1988] 2 SCR 417, 426.
13. The common law or, more precisely, courts of equity have long afforded protection to the wrongful use of private information by means of the cause of action which became known as breach of confidence. A breach of confidence was restrained as a form of unconscionable conduct, akin to a breach of trust. Today this nomenclature is misleading. The breach of confidence label harks back to the time when the cause of action was based on

improper use of information disclosed by one person to another in confidence. To attract protection the information had to be of a confidential nature. But the gist of the cause of action was that information of this character had been disclosed by one person to another in circumstances 'importing an obligation of confidence' even though no contract of non-disclosure existed: see the classic exposition by Megarry J in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 47–48. The confidence referred to in the phrase 'breach of confidence' was the confidence arising out of a confidential relationship.

14. This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so it has changed its nature. In this country this development was recognised clearly in the judgment of Lord Goff of Chieveley in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281. Now the law imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Even this formulation is awkward. The continuing use of the phrase 'duty of confidence' and the description of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called 'confidential'. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.
15. In the case of individuals this tort, however labelled, affords respect for one aspect of an individual's privacy. That is the value underlying this cause of action. An individual's privacy can be invaded in ways not involving publication of information. Strip-searches are an example. The extent to which the common law as developed thus far in this country protects other forms of invasion of privacy is not a matter arising in the present case. It does not arise because, although pleaded more widely, Miss Campbell's common law claim was throughout presented in court exclusively on the basis of breach of confidence, that is, the wrongful *publication* by the 'Mirror' of private *information*.
16. The European Convention on Human Rights, and the Strasbourg jurisprudence, have undoubtedly had a significant influence in this area of the common law for some years. The provisions of article 8, concerning respect for private and family life, and article 10, concerning freedom of expression, and the interaction of these two articles, have prompted the courts of this country to identify more clearly the different factors involved in cases where one or other of these two interests is present. Where both are present the courts are increasingly explicit in evaluating the competing considerations involved. When identifying and evaluating these factors the courts, including your Lordships' House, have tested the common law against the values encapsulated in these two

articles. The development of the common law has been in harmony with these articles of the Convention: see, for instance, *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 203–204.

17. The time has come to recognise that the values enshrined in articles 8 and 10 are now part of the cause of action for breach of confidence. As Lord Woolf CJ has said, the courts have been able to achieve this result by absorbing the rights protected by articles 8 and 10 into this cause of action: *A v B plc* [2003] QB 195, 202, para 4. Further, it should now be recognised that for this purpose these values are of general application. The values embodied in articles 8 and 10 are as much applicable in disputes between individuals or between an individual and a non-governmental body such as a newspaper as they are in disputes between individuals and a public authority.
18. In reaching this conclusion it is not necessary to pursue the controversial question whether the European Convention itself has this wider effect. Nor is it necessary to decide whether the duty imposed on courts by section 6 of the Human Rights Act 1998 extends to questions of substantive law as distinct from questions of practice and procedure. It is sufficient to recognise that the values underlying articles 8 and 10 are not confined to disputes between individuals and public authorities. This approach has been adopted by the courts in several recent decisions, reported and unreported, where individuals have complained of press intrusion. A convenient summary of these cases is to be found in Gavin Phillipson's valuable article 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66 MLR 726, 726–728. ...

### **The present case**

23. I turn to the present case and consider first whether the information whose disclosure is in dispute was private. Mr Caldecott QC placed the information published by the newspaper into five categories: (1) the fact of Miss Campbell's drug addiction; (2) the fact that she was receiving treatment; (3) the fact that she was receiving treatment at Narcotics Anonymous; (4) the details of the treatment – how long she had been attending meetings, how often she went, how she was treated within the sessions themselves, the extent of her commitment, and the nature of her entrance on the specific occasion; and (5) the visual portrayal of her leaving a specific meeting with other addicts.
24. It was common ground between the parties that in the ordinary course the information in all five categories would attract the protection of article 8. But Mr Caldecott recognised that, as he put it, Miss Campbell's 'public lies' precluded her from claiming protection for categories (1) and (2). When talking to the media Miss Campbell went out of her way to say that, unlike many fashion models, she did not take drugs. By repeatedly making

these assertions in public Miss Campbell could no longer have a reasonable expectation that this aspect of her life should be private. Public disclosure that, contrary to her assertions, she did in fact take drugs and had a serious drug problem for which she was being treated was not disclosure of private information. As the Court of Appeal noted, where a public figure chooses to present a false image and make untrue pronouncements about his or her life, the press will normally be entitled to put the record straight: [2003] QB 633, 658. Thus the area of dispute at the trial concerned the other three categories of information.

25. Of these three categories I shall consider first the information in categories (3) and (4), concerning Miss Campbell's attendance at Narcotics Anonymous meetings. In this regard it is important to note this is a highly unusual case. On any view of the matter, this information related closely to the fact, which admittedly could be published, that Miss Campbell was receiving treatment for drug addiction. Thus when considering whether Miss Campbell had a reasonable expectation of privacy in respect of information relating to her attendance at Narcotics Anonymous meetings the relevant question can be framed along the following lines: Miss Campbell having put her addiction and treatment into the public domain, did the further information relating to her attendance at Narcotics Anonymous meetings retain its character of private information sufficiently to engage the protection afforded by article 8?
26. I doubt whether it did. Treatment by attendance at Narcotics Anonymous meetings is a form of therapy for drug addiction which is well known, widely used and much respected. Disclosure that Miss Campbell had opted for this form of treatment was not a disclosure of any more significance than saying that a person who has fractured a limb has his limb in plaster or that a person suffering from cancer is undergoing a course of chemotherapy. Given the extent of the information, otherwise of a highly private character, which admittedly could properly be disclosed, the additional information was of such an unremarkable and consequential nature that to divide the one from the other would be to apply altogether too fine a toothcomb. Human rights are concerned with substance, not with such fine distinctions. . . .
30. There remains category (5): the photographs taken covertly of Miss Campbell in the road outside the building she was attending for a meeting of Narcotics Anonymous. I say at once that I wholly understand why Miss Campbell felt she was being hounded by the 'Mirror'. I understand also that this could be deeply distressing, even damaging, to a person whose health was still fragile. But this is not the subject of complaint. Miss Campbell, expressly, makes no complaint about the taking of the photographs. She does not assert that the taking of the photographs was itself an invasion of

privacy which attracts a legal remedy. The complaint regarding the photographs is of precisely the same character as the nature of the complaints regarding the text of the articles: the information conveyed by the photographs was private information. Thus the fact that the photographs were taken surreptitiously adds nothing to the only complaint being made.

31. In general photographs of people contain more information than textual description. That is why they are more vivid. That is why they are worth a thousand words. But the pictorial information in the photographs illustrating the offending article of 1 February 2001 added nothing of an essentially private nature. They showed nothing untoward. They conveyed no private information beyond that discussed in the article. The group photograph showed Miss Campbell in the street exchanging warm greetings with others on the doorstep of a building. There was nothing undignified or distraught about her appearance. The same is true of the smaller picture on the front page. Until spotted by counsel in the course of preparing the case for oral argument in your Lordships' House no one seems to have noticed that a sharp eye could just about make out the name of the café on the advertising board on the pavement.
32. For these reasons and those given by my noble and learned friend Lord Hoffmann, I agree with the Court of Appeal that Miss Campbell's claim fails."

### **Law in the United States**

Reread Restatement (Second) of Torts, § 652D above pp. 351–352.

### **Diaz v. Oakland Tribune, 139 Cal. App. 3d 118 (1983)**

"Diaz is a transsexual. She was born in Puerto Rico in 1942 as Antonio Diaz, a male ... [She] scrupulously kept the surgery a secret from all but her immediate family and closest friends. She never sought to publicize the surgery. She changed her name to Toni Ann Diaz and made the necessary changes in her high school records, her social security records, and on her driver's license. She tried unsuccessfully to change her Puerto Rican birth certificate." ...

"In spring 1977, she was elected student body president [of the College of Alameda] for the 1977–78 academic year, the first woman to hold that office ... In 1977 Diaz was also selected to be the student body representative to the Peralta Community College Board of Trustees ... Near the middle of her term as student body president, Diaz became embroiled in a controversy in which she charged the College administrators with misuse of student funds. The March 15, 1978, issue of the Tribune quoted Diaz's charge that her signature had improperly been 'rubber stamped' on checks drawn from the associated students' account ...



Shortly after the controversy arose, Jones was informed by several confidential sources that Diaz was a man. Jones considered the matter newsworthy if he could verify the information. Jones testified that he inspected the Tribune's own files and spoke with an unidentified number of persons at the College to confirm this information. It was not until Richard Paoli, the city editor of the Tribune, checked Oakland city police records that the information that Diaz was born a man was verified ...

On March 26, 1978, the following item appeared in Jones' newspaper column: 'More Education Stuff: The students at the College of Alameda will be surprised to learn that their student body president, Toni Diaz, is no lady, but is in fact a man whose real name is Antonio.'

'Now I realize, that in these times, such a matter is no big deal, but I suspect his female classmates in P.E. 97 may wish to make other showering arrangements.' ...

The concept of a common law right to privacy was first developed in a landmark article by Warren and Brandeis, *The Right to Privacy* (1890) 4 *Harv.L.Rev.* 193, and has been adopted in virtually every state [footnote omitted]. The specific privacy right with which we are concerned is the right to be free from public disclosure of private embarrassing facts, in short, 'the right to be let alone.' (*Melvin v. Reid* (1931) 112 *Cal. App.* 285, 289 [297 P. 91].) ...

As discerned from the decisions of our courts, the public disclosure tort contains the following elements: (1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern [citing *Forsher v. Bugliosi* (1980) 26 *Cal.3d* 792, 808–09; *Briscoe v. Reader's Digest Association, Inc.* (1971) 4 *Cal.3d* 529, 541–44; *Kapellas v. Kofman* (1969) 1 *Cal.3d* 20, 34–329].

[W]hether the fact of Diaz's sexual identity was newsworthy is measured along a sliding scale of competing interests: the individual's right to keep private facts from the public's gaze versus the public's right to know. (See *Kapellas v. Kofman, supra*, 1 *Cal.3d* at p. 36.) In an effort to reconcile these competing interests, our courts have settled on a three-part test for determining whether matter published is newsworthy: [1] the social value of the facts published, [2] the depth of the article's intrusion into ostensibly private affairs, and [3] the extent to which the party voluntarily acceded to a position of public notoriety. (*Briscoe v. Reader's Digest Association, Inc., supra*, 4 *Cal.3d* at p. 541.)

[D]efendants urge that, as the first female student body president of the College, Diaz was a public figure, and the fact of her sexual identity was a newsworthy item as a matter of law. We disagree.

It is well settled that persons who voluntarily seek public office or willingly become involved in public affairs waive their right to privacy of matters connected with their public conduct. (*Kapellas v. Kofman, supra*, 1 *Cal.3d* at pp. 36–38.) The reason behind this rule is that the public should be afforded every opportunity of learning about any facet which may affect

that person's fitness for office. (See *Briscoe v. Reader's Digest Association, Inc.*, *supra*, 4 Cal.3d at p. 535; Rest.2d Torts, *supra*, § 652D, com. e.)

However, the extent to which Diaz voluntarily acceded to a position of public notoriety and the degree to which she opened her private life are questions of fact. (*Briscoe v. Reader's Digest Association, Inc.*, *supra*, 4 Cal.3d at p. 541.) As student body president, Diaz was a public figure for some purposes. However, applying the three-part test enunciated in *Briscoe*, we cannot state that the fact of her gender was newsworthy *per se*.

Contrary to defendants' claim, we find little if any connection between the information disclosed and Diaz's fitness for office. The fact that she is a transsexual does not adversely reflect on her honesty or judgment. (Cf. *Kapellas v. Kofman*, *supra*, 1 Cal.3d 20 [plaintiff, a mother and candidate for Alameda City Council, who repeatedly left her minor children unsupervised, could not maintain an action against a newspaper for publishing information taken from police records of her children's criminal behavior]; *Beruan v. French* (1976) 56 Cal. App.3d 825 [candidate for secretary-treasurer of union local could not maintain action based on publication of a letter disclosing his six prior criminal convictions].)

Nor does the fact that she was the first woman student body president, in itself, warrant that her entire private life be open to public inspection. The public arena entered by Diaz is concededly small. Public figures more celebrated than she are entitled to keep some information of their domestic activities and sexual relations private. (See Rest.2d Torts, *supra*, § 652D, com. h.)

Nor is there merit to defendants' claim that the changing roles of women in society make this story newsworthy. This assertion rings hollow. The tenor of the article was by no means an attempt to enlighten the public on a contemporary social issue. Rather, as Jones himself admitted, the article was directed to the students at the College about their newly elected president. Moreover, Jones' attempt at humor at Diaz's expense removes all pretense that the article was meant to educate the reading public. The social utility of the information must be viewed in context, and not based upon some arguably meritorious and unintended purpose."

### **Florida Star v. B.J.F., 491 U.S. 524 (1989)**

Marshall, J. "Florida Stat. § 794.03 (1987) makes it unlawful to 'print, publish, or broadcast . . . in any instrument of mass communication' the name of the victim of a sexual offense. Pursuant to this statute, appellant The Florida Star was found civilly liable for publishing the name of a rape victim which it had obtained from a publicly released police report. The issue presented here is whether this result comports with the First Amendment. We hold that it does not . . .

On October 20, 1983, appellee B.J.F. reported to the Duval County, Florida, Sheriff's Department (Department) that she had been robbed and

sexually assaulted by an unknown assailant. The Department prepared a report on the incident which identified B.J.F. by her full name. The Department then placed the report in its pressroom. The Department does not restrict access either to the pressroom or to the reports made available therein.

A Florida Star reporter-trainee sent to the pressroom copied the police report verbatim, including B.J.F.'s full name, on a blank duplicate of the Department's forms. A Florida Star reporter then prepared a one-paragraph article about the crime, derived entirely from the trainee's copy of the police report. The article included B.J.F.'s full name.

In printing B.J.F.'s full name, the Florida Star violated its internal policy of not publishing the names of sexual offense victims.

At the ensuing daylong trial, B.J.F. testified that she had suffered emotional distress from the publication of her name. She stated that she had heard about the article from fellow workers and acquaintances; that her mother had received several threatening phone calls from a man who stated that he would rape B.J.F. again; and that these events had forced B.J.F. to change her phone number and residence, to seek police protection, and to obtain mental health counseling ...

We conclude that imposing damages on appellant for publishing B.J.F.'s name violates the First Amendment, although not for either of the reasons appellant urges. Despite the strong resemblance this case bears to *Cox Broadcasting*, that case cannot fairly be read as controlling here. The name of the rape victim in that case was obtained from courthouse records that were open to public inspection, a fact which Justice White's opinion for the Court repeatedly noted. 420 U.S. at 492 (noting 'special protected nature of accurate reports of judicial proceedings'); see also *id.*, at 493, 496. Significantly, one of the reasons we gave in *Cox Broadcasting* for invalidating the challenged damages award was the important role the press plays in subjecting trials to public scrutiny and thereby helping guarantee their fairness. *Id.*, at 492–93. That role is not directly compromised where, as here, the information in question comes from a police report prepared and disseminated at a time at which not only had no adversarial criminal proceedings begun, but no suspect had been identified.

Nor need we accept appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment. Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily ...

Our holding today is limited ... We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and that no such interest is satisfactorily served by imposing liability under § 794.03 to appellant under the facts of this case."

**French Law****Cour de cassation, 1<sup>e</sup> ch. civ., arrêt no. 1434, pourvoi no. 89–13.049**

The magazine *l'Expansion* wrote an article about “the one hundred richest Frenchmen” which mentioned the amount of plaintiff's net worth, even though he had written a letter asking the magazine not to do so. He lost before the *Cour d'appel*. The *Cour de cassation* upheld its decision saying that a person's private life was not invaded by publishing “information of a purely financial order that excludes any allusion to the life or personality of the interested party.”

**Cour de cassation, 2<sup>e</sup> ch. civ., April 27, 1988, pourvoi no. 86–13.303**

Mr. Varin, the plaintiff, was a judge of a *Tribunal de grande instance* who was temporarily relieved of his functions. The defendant, the journal *La Haute-Marne Libérée*, published an article with his photograph describing his removal as a “serious sanction” for which the reasons were not clear, adding that “according to rumors,” he had taken a vacation for nervous depression. The *Cour de cassation* held that while temporary removal was not a “grave sanction,” any claim plaintiff had for defamation was barred by the statute of limitation to which such claims are subject; that use of the photograph was permissible because of the public character of his functions and the measures taken against him; but that “divulging information on the health of a person” without his consent “violated his right to a private life even if the information was presented decently and succinctly.”

**Cour de cassation, 2<sup>e</sup> ch. civ., December 5, 1979, arrêt no. 1.032, pourvoi no. 78–13.614**

The defendant, the newspaper *Paris-Match*, published an article under the title “Violence” which described an altercation between Mrs. Dewi Sukarno, widow of the president of Indonesia, and Beatrice Chatelier, the former wife of Eddie Barclay, “for the handsome eyes of a Parisian playboy.” The defendant argued that he was entitled, as a journalist, to describe the facts and give his interpretation. The *Cour de Cassation* held him liable for a violation of privacy because his article “discussed the emotional life (*vie sentimentale*) of Mrs. Sukarno in disclosing the personal and intimate motives of the parties said to be the origin of the altercation, here, ‘the handsome eyes of a Parisian playboy.’”

**Cour de cassation, 2<sup>e</sup> ch. civ., November 14, 1975, arrêt no. 729, pourvoi no. 74–11.278**

The defendant, *Presse-Office Lui*, ran an article on Charles Chaplin, plaintiff here. Just what it said is described in the opinion rather imprecisely: “numerous details relative to the private life of Chaplin and his family.” The *Cour d'appel* held the defendant liable on the grounds that even if disclosure of these details would not have violated Chaplin's right to

privacy if published in an historical study, it does here because *Lui* is not an historical journal.

Without expressly accepting or rejecting that distinction, the *Cour de Cassation* upheld its decision, saying: “*Presse Office* has never claimed for the magazine *Lui* the character of a scientific and critical publication and did not present the article attacked as an historical study. [It follows that] the distinction which the *Cour d’appel* believed that it should draw in the interest of certain publications is of no application to the decision here.”

The defendant also objected that the *Cour d’appel* had “recognized the discretionary right of a private person to object to the ‘redisclosure’ of facts already disclosed with his own consent.” The *Cour de cassation* quoted with favor these words of the *Tribunal d’instance*: “everyone having the right to respect for his private life, it matters little that books and periodicals had already treated the same facts, and whoever, without a legitimate interest, publishes facts of this nature is liable if he cannot show he was specially authorized . . . .” It also quoted with favor these words from the *Cour d’appel*: “The person who himself discloses information about his private life so decides with full knowledge of the reason that it is made known to the public and the conditions on which it is made known.” The *Cour de cassation* concluded that neither of the lower courts had recognized a “discretionary right” to object to “redisclosure.”

### German Law

#### **Oberlandesgericht, Hamburg, March 26, 1970, NJW 1970, 1325**

“The claim of the plaintiff, the wife of Prince Friedrich William of Prussia, for culpable publication of her intention to divorce in a newspaper is valid under §§ 823(1) and 1004 of the Civil Code and arts. 1 and 2 of the Constitution.

It cannot be doubted that the private sphere of the person concerned is invaded by information given the reader by the press about an intention to divorce or discussions of divorce. The private or intimate sphere is protected in principle by arts. 1 and 2 of the Constitution. According to art. 6, par. 1 of the Constitution, marriage and the family are given special protection by the order of the state. In principle, the defendant is not entitled, without the permission of the person concerned, to report even true facts about her divorce and the discussions and actions relating to it . . .

The defendant cannot invoke art. 5 of the Constitution in its defense. Certainly, freedom of the press does include freedom of information so that known facts can be reported. Nevertheless, in accord with art. 5(2) of the Constitution, this right is limited by the provisions of general statutes and by arts. 1 and 2 of the Constitution. By weighing the two fundamental rights, on the one hand, freedom of the press, and on the other, the right to personality, which interest to protect must depend upon the individual case. In principle, the private sphere must be given attention and has a preference over the right of the press to provide information. Every person is protected against all violation of his own sphere on the basis of the

general right of personality. (BGHZ 24, 201 ff. = NJW 57, 1315). The protection of the personality must take second place to the right of the press to inform only when the public has a serious need for the information (BGH, LM no. 16 on art. 5 of the Constitution = MDR 65, 371 ff. with numerous references). One can recognise a legitimate public interest in information about events in the private or family sphere only by way of exception when the person involved has a particularly prominent position. The need for entertainment of the readership of a newspaper cannot justify such an attack ...

Certainly, through her marriage with Prince Friedrich William, the plaintiff became a member of the house of Hohenzollern as is the son born of this marriage. But that did not make her a figure of current history whose private life the press can report without her consent. Her husband is not a figure of contemporary history because he does not play a role in public life nor has he aroused general interest in art, science or sport. The mere fact that he is the oldest son of the head of the house of Hohenzollern does not make him a figure of contemporary history, and it is indeed questionable whether Prince Louis Ferdinand of Prussia is to be numbered among this circle of persons. In principle, current history is to be understood to include the events of the present of importance and interest generally. The members of the house of Hohenzollern are not figures of contemporary history in this sense since they do not occupy position either in political or in cultural life. If Prince Louis Ferdinand once did say that he was on hand if the German people should call him, that did not make him a figure of current history since it is not a matter of a person's subjective attitude. Since, with an interruption, Germany has been a republic for fifty years, the House of Hohenzollern has had only historical significance since the abdication of Kaiser Wilhelm II."

### Chinese Law

**Shi et al. v. Xu**, 施某某、张某某、桂某某诉徐某某肖像权、名誉权、隐私权 (citation unavailable)

Xu, the defendant, published on Sina Microblog nine pixelated pictures of one of the plaintiffs, Shi, a minor, exposing physical abuse of him by step parents (two of the plaintiffs) who adopted Shi at the age of six. As Xu stated in the blog post, he published the information only as the last resort after fruitless effort from school teachers. He was hoping to call for attention and seek public assistance to ending this child abuse problem.

Xu was sued by Shi and both of his birth and step parents for harm to Shi's right of image, right of privacy and right of reputation.

The harm to right of image was not supported by the court because there was no intent to profit.

The harm to right of reputation was also denied because of the lack of malicious intent.



According to the Jiangning district court of Nanjing, “[t]he right of privacy concerns a private right to possess personal information in conducting one’s private affairs in the private sphere which does not concern the public interest. Here, the defendant disclosed true information for the purpose of protecting a minor and exposing potential criminal conduct. His behavior was in line with the public interest and the best interest of the child. In addition, he was careful in the way he disclosed the information by pixelating the faces of Shi, which could not easily lead to the positive identification of Shi. The blogpost also did not disclose the name and address of Shi. Xu’s conduct could only be for the purpose of exposing potential criminal conduct, and therefore he was not at fault.” The claim for harm to privacy was denied.

## ii. About Historical Events Law in the United States

### Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222 (7th Cir. 1993)

Posner, J. “Luther Haynes and his wife, Dorothy Haynes née Johnson, appeal from the dismissal on the defendants’ motion for summary judgment of their suit against Nicholas Lemann, the author of a highly praised, best-selling book of social and political history called *The Promised Land: The Great Black Migration and How It Changed America* (1991), and Alfred A. Knopf, Inc., the book’s publisher. The plaintiffs claim that the book libels Luther Haynes and invades both plaintiffs’ right of privacy . . .

Between 1940 and 1970, five million blacks moved from impoverished rural areas and, after sojourns of shorter or greater length in the poor black districts of the cities, moved to middle-class areas. Others, despite the ballyhooed efforts of the federal government, particularly between 1964 and 1972, to erase poverty and racial discrimination, remained mired in what has come to be called the ‘urban ghetto.’ *The Promised Land* is a history of the migration. It is not history as a professional historian, a demographer, or a social scientist would write it. Lemann is none of these. He is a journalist and has written a journalistic history, in which the focus is on individuals whether powerful or representative. In the former group are the politicians who invented, executed, or exploited the ‘Great Society’ programs. In the latter are a handful of the actual migrants. Foremost among these is Ruby Lee Daniels. Her story is the spine of the book. We are introduced to her on page 7; we take leave of her on page 346, within a few pages of the end of the text of the book.

The book describes how Daniels, who had been a sharecropper in Mississippi in the 1940s, moved to Chicago where she met and married Luther Haynes. The story describes his failures as a worker and a husband through drunkenness, bad temper, and adultery. They were divorced. Luther later married another woman, Dorothy, and lived a respectable life for twenty years. At the time the book was published, he had a home, a steady job, and was a deacon of his local church.

The possibility of an involuntary loss of privacy is recognized in the modern formulations of this branch of the privacy tort, which require not

only that the private facts publicized be such as would make a reasonable person deeply offended by such publicity but also that they be facts in which the public has no legitimate interest.

The two criteria, offensiveness and newsworthiness, are related. An individual, and more pertinently perhaps the community, is most offended by the publication of intimate personal facts when the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger. The reader of a book about the black migration to the North would have no legitimate interest in the details of Luther Haynes' sex life; but no such details are disclosed. Such a reader does have a legitimate interest in the aspects of Luther's conduct that the book reveals. For one of Lemann's major themes is the transposition virtually intact of a sharecropper morality characterized by a family structure 'matriarchal and elastic' and by an 'extremely unstable' marriage bond to the slums of the northern cities, and the interaction, largely random and sometimes perverse, of that morality with governmental programs to alleviate poverty. Public aid policies discouraged Ruby and Luther from living together; public housing policies precipitated a marriage doomed to fail. No detail in the book claimed to invade the Hayneses' privacy is not germane to the story that the author wanted to tell, a story not only of legitimate but of transcendent public interest . . .

Well, argue the Hayneses, at least Lemann could have changed their names. But the use of pseudonyms would not have gotten Lemann and Knopf off the legal hook. The details of the Hayneses' lives recounted in the book would identify them unmistakably to anyone who has known the Hayneses well for a long time (members of their families, for example), or who knew them before they got married; and no more is required for liability either in defamation law or in privacy law. Lemann would have had to change some, perhaps many, of the details. But then he would no longer have been writing history. He would have been writing fiction. The non-quantitative study of living persons would be abolished as a category of scholarship, to be replaced by the sociological novel. That is a genre with a distinguished history punctuated by famous names, such as Dickens, Zola, Stowe, Dreiser, Sinclair, Steinbeck, and Wolfe, but we do not think that the law of privacy makes it (or that the First Amendment would permit the law of privacy to make it) the exclusive format for a social history of living persons that tells their story rather than treating them as data points in a statistical study."

### French Law

**Cour de cassation, 1e ch. civ., November 20, 1990, arrêt no. 1432, pourvoi no. 89-12.580**

Defendants were the writer (Paul Kern) and publisher of a book, "A Toboggan in the Torment of the France-Compte 1940-45," a study of the Nazi occupation of the Franche Comte, which, the author said, would describe "historical truth down to its smallest details." He mentioned a

man who was tried and condemned as a traitor in 1946 “along with his mistress Mananges.” She brought this action for infringement on her private life (*vie privée*). She won before the court of first instance and lost before the *Cour d’appel*. The *Cour d’appel* said: “it must be acknowledged that he had the right as an historian to present the evidence of facts, without the consent of the interested parties, even if they touch on one’s private life, if they have a definite relation to the subject, are related with objectivity and without an intention to injure and if they were, as in this case, already brought to public awareness by the reports of judicial debates contained in the local press immediately after the war.”

The *Cour de cassation* overturned this decision. It said that the *Cour d’appel* had erred by taking the author’s assertion that he did not intend to injure at face value. It said that even an historian does not have the right to “bring up the private life of a person without necessity.” The court concluded, however, that the author was entitled to mention her conviction for treason since it had once been reported in the local press. Nevertheless, he should also have mentioned that she was subsequently pardoned. He is liable because he failed to do so.

### German Law

#### **Oberlandesgericht, Frankfurt, September 6, 1979, NJW 1980, 597**

The defendant, the weekly magazine S., published a series on Nazi experiments on children in a concentration camp. One article in the series contained the following references to A., the plaintiff:

One of the perpetrators lives among us. His name is A. On orders from Berlin, he let the children be killed.

One of those responsible for the death of the children lives among us: the former Obersturmführer A.

The article accused him of responsibility for the deaths of twenty children in April, 1945.

The court held that the plaintiff could not recover for *üble Nachrede* because truth was a defense, and where, as here, constitutionally important interests were at stake, the usual burden of proof was reversed so that the plaintiff had the burden of proving that the statement was false. He had failed to do so.

“The starting point for the Senate must be that while the plaintiff’s full guilt for these outrages has not been established, there is serious reason for suspicion. On those facts, the press has a legitimate interest in making the contentions to which the plaintiff objects public. In informing, instructing and supporting the shaping of public opinion, the press has a legitimate interest in reporting concretely the facts that are essential for evaluating a former period of time, in preserving the memory of the era of national socialist rule, in contributing to an impartial view by its readers of these horrible acts of power, and even to help toward a clarification of particular criminal acts through the publication of further details. It is not in dispute

that the case law recognizes such an extensive right for the press in the public interest. (See OLG, München NJW 1970, 1745; OLG, Frankfurt, NJW 1971, 47; Thomas in Palandt, no. 15 D b to § 823.)

This interest must certainly in some cases conflict with the interest of the party affected, here the defendant, whom it would suit to remain undisturbed and to develop his personality (*Persönlichkeit*) without restriction according to his own wishes. It has not been overlooked that the defendant, now seventy years old, for whom the alleged wrongs lie over thirty years in the past, has a strong interest in not having to confront these horrible reproaches which must distress him and bring him into contempt in the eyes of his friends and acquaintances and the public. Since the defendant has not carried the burden which rests on him to prove falsity, and since many important indications are against him, his interest is outweighed for the reasons just given by the interest of the public in exposition and instruction concerning those events remote from the present.

The defendant has observed the limits commanded by the recognition of its legitimate interest. It confined its publication to the legally proper area. It carefully researched the alleged wrongs of the plaintiff."

### Chinese Law

#### Ge Changsheng v. Hong Zhenkuai, Guiding Case No. 99

The Five Warriors of Langya Mountain Battle is a well-known story that has been included in the mandatory elementary school reading for many years. The story described how, in 1941, during the Sino-Japanese war, five Chinese soldiers managed to cover the retreat of the troops and civilians and deter a massive assault by Japanese troops. The official story was that when they ran out of the bullets and grenades, they bravely jumped off the cliff all together to avoid being captured. Two of the soldiers survived.

An academic article was written by the defendant, Hong. The defendant questioned the authenticity of the story and proved through the use of historical materials, that the story was exaggerated as was the heroism of the soldiers. For example, he showed that the two surviving soldiers did not actually jump off the cliff at all and were captured and eventually escaped. The other three soldiers were killed by Japanese. The whole piece was exaggerated propaganda.

The son of one of the soldiers who survived, Ge, sued Hong for infringement upon rights of reputation and honor. An injunction was given by the trial court, Xicheng District Court of Beijing and the defendant was ordered to issue a public apology. The case was upheld by the appellate court, second intermediate court of Beijing, and named a guiding case by the Supreme Court. The court reasoned that the Langya mountain battle was a famous one massively corroborated by fact. In this battle, the brave acts and the daring spirit of the "warriors" were widely and highly praised by the whole nation. On this basis the warriors achieved their supreme

reputation and honor, which is not only a recognition of their personal sacrifice: the personal honor and reputation belong to these individuals. In time of peace, their fearless and selfless spirit and lifelong dedication to the country still provide guidance for the nation. The warriors and their spirit are widely recognized by the whole nation and have become part of the common memories of the Chinese nationals. It is also one of the very important core values among socialist and Chinese core values. Common memories, national spirit, and socialist core values belong to the socialist public interest. This article never positively recognized the basic facts of the courage and sacrifice made by the warriors. Instead it focused on some details such as the exact location of the jumping off point and the exact number of casualties, and whether warriors took the carrots of the civilians. Without sufficient evidence, the author made groundless conjectures and comments based on materials and comments of the survivors from different periods of time. The emphasis the author placed on irrelevant or marginally relevant facts led to the doubts of readers concerning the brave acts and fearless and selfless spirits of the warriors. It denied the authenticity of the basic facts, and further damaged the heroic images and the value of their spirit. The widespread dissemination of the article through its publication and internet has had a nationwide impact, which not only harms Ge Zhenlin's personal reputation and honor and Ge Changshen's feelings, but also, to some extent, national historical feelings. Consequently, the publication of the article harmed the public interest. As someone who has capability in doing research and proficiency in using internet, Hong could have expected that this publication would harm warriors' reputation and honor, their family and relative's feelings and cause their emotional distress, and further harm public interest of them and society. Hong was certainly mentally culpable when he had the ability to control the outcome of the publication and yet decided to publish the article as it was.

**Note.** When the Supreme Court believes a decision is of particular importance for the decisions of lower court judges, it describes it as a "Guiding Case," as in the case above.

### **c. Electronic Collection and Dissemination of Information**

#### **Regulation (EU) 2016/679 of The European Parliament and the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data**

The European Parliament and the Council of the European Union

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,  
Having regard to the opinion of the European Economic and Social Committee,  
Having regard to the opinion of the Committee of the Regions,  
Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1). The protection of natural persons in relation to the processing of personal data is a fundamental right. Article 8(1) of the Charter of Fundamental Rights of the European Union (the “Charter”) and Article 16(1) of the Treaty on the Functioning of the European Union (TFEU) provide that everyone has the right to the protection of personal data concerning him or her.
- (2). The principles of, and rules on the protection of natural persons with regard to the processing of their personal data should, whatever their nationality or residence, respect their fundamental rights and freedoms, in particular their right to the protection of personal data. This Regulation is intended to contribute to the accomplishment of an area of freedom, security and justice and of an economic union, to economic and social progress, to the strengthening and the convergence of the economies within the internal market, and to the well-being of natural persons.
- (3). Directive 95/46/EC of the European Parliament and of the Council seeks to harmonise the protection of fundamental rights and freedoms of natural persons in respect of processing activities and to ensure the free flow of personal data between Member States.
- (4). The processing of personal data should be designed to serve mankind. The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. This Regulation respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information, freedom to conduct a business, the right to an effective remedy and to a fair trial, and cultural, religious and linguistic diversity.
- (5). The economic and social integration resulting from the functioning of the internal market has led to a substantial increase in cross-border flows of personal data. The exchange of personal data between public and private actors, including natural persons, associations and undertakings across the Union has increased. National authorities in the Member States are being called upon



by Union law to cooperate and exchange personal data so as to be able to perform their duties or carry out tasks on behalf of an authority in another Member State.

- (6). Rapid technological developments and globalisation have brought new challenges for the protection of personal data. The scale of the collection and sharing of personal data has increased significantly. Technology allows both private companies and public authorities to make use of personal data on an unprecedented scale in order to pursue their activities. Natural persons increasingly make personal information available publicly and globally. Technology has transformed both the economy and social life, and should further facilitate the free flow of personal data within the Union and the transfer to third countries and international organisations, while ensuring a high level of the protection of personal data.
- (7). Those developments require a strong and more coherent data protection framework in the Union, backed by strong enforcement, given the importance of creating the trust that will allow the digital economy to develop across the internal market. Natural persons should have control of their own personal data. Legal and practical certainty for natural persons, economic operators and public authorities should be enhanced. . . .

Have adopted this regulation

#### CHAPTER I: GENERAL PROVISIONS

##### ARTICLE 1: SUBJECT-MATTER AND OBJECTIVES

1. This Regulation lays down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data.
2. This Regulation protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data.
3. The free movement of personal data within the Union shall be neither restricted nor prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data.

##### ARTICLE 2: MATERIAL SCOPE

1. This Regulation applies to the processing of personal data wholly or partly by automated means and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system.
2. This Regulation does not apply to the processing of personal data:
  - (a). in the course of an activity which falls outside the scope of Union law;

- (b). by the Member States when carrying out activities which fall within the scope of Chapter 2 of Title V of the TEU;
- (c). by a natural person in the course of a purely personal or household activity;
- (d). by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security. . . .

#### ARTICLE 3: TERRITORIAL SCOPE

1. This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.
2. This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:
  - (a). the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or
  - (b). the monitoring of their behaviour as far as their behaviour takes place within the Union.
3. This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law.

#### ARTICLE 4: DEFINITIONS

For the purposes of this Regulation:

- (1). “personal data” means any information relating to an identified or identifiable natural person (“data subject”); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;
- (2). “processing” means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction;
- (3). “restriction of processing” means the marking of stored personal data with the aim of limiting their processing in the future;

- (4). “profiling” means any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person’s performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements;
- (5). “pseudonymisation” means the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person;
- (6). “filing system” means any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis;
- (7). “controller” means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law;
- (8). “processor” means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller;
- (9). “recipient” means a natural or legal person, public authority, agency or another body, to which the personal data are disclosed, whether a third party or not. However, public authorities which may receive personal data in the framework of a particular inquiry in accordance with Union or Member State law shall not be regarded as recipients; the processing of those data by those public authorities shall be in compliance with the applicable data protection rules according to the purposes of the processing;
- (10). “third party” means a natural or legal person, public authority, agency or body other than the data subject, controller, processor and persons who, under the direct authority of the controller or processor, are authorised to process personal data;
- (11). “consent” of the data subject means any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her;

- (12). “personal data breach” means a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed; . . .

## CHAPTER II: PRINCIPLES

### ARTICLE 5: PRINCIPLES RELATING TO PROCESSING OF PERSONAL DATA

1. Personal data shall be:
  - (a). processed lawfully, fairly and in a transparent manner in relation to the data subject (“lawfulness, fairness and transparency”);
  - (b). collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes (“purpose limitation”);
  - (c). adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (“data minimisation”);
  - (d). accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay (“accuracy”);
  - (e). kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject (“storage limitation”);
  - (f). processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures (“integrity and confidentiality”).
2. The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 (“accountability”).

### ARTICLE 6: LAWFULNESS OF PROCESSING

1. Processing shall be lawful only if and to the extent that at least one of the following applies:

- (a). the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
  - (b). processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
  - (c). processing is necessary for compliance with a legal obligation to which the controller is subject;
  - (d). processing is necessary in order to protect the vital interests of the data subject or of another natural person;
  - (e). processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
  - (f). processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.
- Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks.
2. Member States may maintain or introduce more specific provisions to adapt the application of the rules of this Regulation with regard to processing for compliance with points (c) and (e) of paragraph 1 by determining more precisely specific requirements for the processing and other measures to ensure lawful and fair processing including for other specific processing situations as provided for in Chapter IX.
- ...
4. Where the processing for a purpose other than that for which the personal data have been collected is not based on the data subject's consent or on a Union or Member State law which constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives referred to in Article 23(1), the controller shall, in order to ascertain whether processing for another purpose is compatible with the purpose for which the personal data are initially collected, take into account, *inter alia*:
    - (a). any link between the purposes for which the personal data have been collected and the purposes of the intended further processing;
    - (b). the context in which the personal data have been collected, in particular regarding the relationship between data subjects and the controller;
    - (c). the nature of the personal data, in particular whether special categories of personal data are processed, pursuant to Article 9, or whether personal data related to criminal

- convictions and offences are processed, pursuant to Article 10;
- (d). the possible consequences of the intended further processing for data subjects;
  - (e). the existence of appropriate safeguards, which may include encryption or pseudonymisation.

ARTICLE 7: CONDITIONS FOR CONSENT

1. Where processing is based on consent, the controller shall be able to demonstrate that the data subject has consented to processing of his or her personal data.
2. If the data subject's consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language. Any part of such a declaration which constitutes an infringement of this Regulation shall not be binding.
3. The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. It shall be as easy to withdraw as to give consent. . . .

...

ARTICLE 9: PROCESSING OF SPECIAL CATEGORIES OF PERSONAL DATA

1. Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited.
2. Paragraph 1 shall not apply if one of the following applies:
  - (a). the data subject has given explicit consent to the processing of those personal data for one or more specified purposes, except where Union or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject;
  - (b). processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law in so far as it is authorised by Union or Member State law or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject;
  - (c). processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent;



- (d). processing is carried out in the course of its legitimate activities with appropriate safeguards by a foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim and on condition that the processing relates solely to the members or to former members of the body or to persons who have regular contact with it in connection with its purposes and that the personal data are not disclosed outside that body without the consent of the data subjects;
- (e). processing relates to personal data which are manifestly made public by the data subject;
- (f). processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity;
- (g). processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject;
- (h). processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services on the basis of Union or Member State law or pursuant to contract with a health professional and subject to the conditions and safeguards referred to in paragraph 3;
- (i). processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices, on the basis of Union or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy;
- (j). processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) based on Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject. ...

ARTICLE 10: PROCESSING OF PERSONAL DATA RELATING TO CRIMINAL CONVICTIONS  
AND OFFENCES

Processing of personal data relating to criminal convictions and offences or related security measures based on Article 6(1) shall be carried

out only under the control of official authority or when the processing is authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects. Any comprehensive register of criminal convictions shall be kept only under the control of official authority.

...

### CHAPTER III: RIGHTS OF THE DATA SUBJECT

#### SECTION 1: TRANSPARENCY AND MODALITIES

##### ARTICLE 12: TRANSPARENT INFORMATION, COMMUNICATION AND MODALITIES FOR THE EXERCISE OF THE RIGHTS OF THE DATA SUBJECT

1. The controller shall take appropriate measures to provide any information referred to in Articles 13 and 14 and any communication under Articles 15 to 22 and 34 relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child. The information shall be provided in writing, or by other means, including, where appropriate, by electronic means. When requested by the data subject, the information may be provided orally, provided that the identity of the data subject is proven by other means. ...

#### SECTION 2: INFORMATION AND ACCESS TO PERSONAL DATA

##### ARTICLE 13: INFORMATION TO BE PROVIDED WHERE PERSONAL DATA ARE COLLECTED FROM THE DATA SUBJECT

1. Where personal data relating to a data subject are collected from the data subject, the controller shall, at the time when personal data are obtained, provide the data subject with all of the following information:
  - (a). the identity and the contact details of the controller and, where applicable, of the controller's representative;
  - (b). the contact details of the data protection officer, where applicable;
  - (c). the purposes of the processing for which the personal data are intended as well as the legal basis for the processing;
  - (d). where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party;
  - (e). the recipients or categories of recipients of the personal data, if any;
  - (f). where applicable, the fact that the controller intends to transfer personal data to a third country or international organisation and the existence or absence of an adequacy decision by the Commission, or in the case of transfers referred to in Article 46 or 47, or the second subparagraph of Article 49(1), reference to the appropriate or suitable safeguards and the

means by which to obtain a copy of them or where they have been made available.

2. In addition to the information referred to in paragraph 1, the controller shall, at the time when personal data are obtained, provide the data subject with the following further information necessary to ensure fair and transparent processing:
  - (a). the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period;
  - (b). the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject or to object to processing as well as the right to data portability;
  - (c). where the processing is based on point (a) of Article 6(1) or point (a) of Article 9(2), the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal;
  - (d). the right to lodge a complaint with a supervisory authority;
  - (e). whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as whether the data subject is obliged to provide the personal data and of the possible consequences of failure to provide such data;
  - (f). the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject. . . .

#### ARTICLE 15: RIGHT OF ACCESS BY THE DATA SUBJECT

1. The data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information:
  - (a). the purposes of the processing;
  - (b). the categories of personal data concerned;
  - (c). the recipients or categories of recipient to whom the personal data have been or will be disclosed, in particular recipients in third countries or international organisations;
  - (d). where possible, the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period;
  - (e). the existence of the right to request from the controller rectification or erasure of personal data or restriction of processing of personal data concerning the data subject or to object to such processing;
  - (f). the right to lodge a complaint with a supervisory authority;
  - (g). where the personal data are not collected from the data subject, any available information as to their source;

- (h). the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.
  - 2. Where personal data are transferred to a third country or to an international organisation, the data subject shall have the right to be informed of the appropriate safeguards pursuant to Article 46 relating to the transfer.
  - 3. The controller shall provide a copy of the personal data undergoing processing. For any further copies requested by the data subject, the controller may charge a reasonable fee based on administrative costs. Where the data subject makes the request by electronic means, and unless otherwise requested by the data subject, the information shall be provided in a commonly used electronic form.
- ...

### SECTION 3: RECTIFICATION AND ERASURE

#### ARTICLE 16: RIGHT TO RECTIFICATION

The data subject shall have the right to obtain from the controller without undue delay the rectification of inaccurate personal data concerning him or her. Taking into account the purposes of the processing, the data subject shall have the right to have incomplete personal data completed, including by means of providing a supplementary statement.

#### ARTICLE 17: RIGHT TO ERASURE ("RIGHT TO BE FORGOTTEN")

- 1. The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:
  - (a). the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
  - (b). the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;
  - (c). the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);
  - (d). the personal data have been lawfully processed;
  - (e). the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;
  - (f). the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).

2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.
3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:
  - (a). for exercising the right of freedom of expression and information;
  - (b). for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
  - (c). for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3);
  - (d). for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or
  - (e). for the establishment, exercise or defence of legal claims.

#### ARTICLE 18: RIGHT TO RESTRICTION OF PROCESSING

1. The data subject shall have the right to obtain from the controller restriction of processing where one of the following applies:
  - (a). the accuracy of the personal data is contested by the data subject, for a period enabling the controller to verify the accuracy of the personal data;
  - (b). the processing is unlawful and the data subject opposes the erasure of the personal data and requests the restriction of their use instead;
  - (c). the controller no longer needs the personal data for the purposes of the processing, but they are required by the data subject for the establishment, exercise or defence of legal claims;
  - (d). the data subject has objected to processing pursuant to Article 21(1) pending the verification whether the legitimate grounds of the controller override those of the data subject. . . .

#### SECTION 4: RIGHT TO OBJECT AND AUTOMATED INDIVIDUAL DECISION-MAKING

##### ARTICLE 21: RIGHT TO OBJECT

1. The data subject shall have the right to object, on grounds relating to his or her particular situation, at any time to processing of personal data concerning him or her which is based on point (e) or (f) of Article 6 (1), including profiling based on those provisions. The controller shall

no longer process the personal data unless the controller demonstrates compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims.

2. Where personal data are processed for direct marketing purposes, the data subject shall have the right to object at any time to processing of personal data concerning him or her for such marketing, which includes profiling to the extent that it is related to such direct marketing.
3. Where the data subject objects to processing for direct marketing purposes, the personal data shall no longer be processed for such purposes. . . .

#### ARTICLE 22: AUTOMATED INDIVIDUAL DECISION-MAKING, INCLUDING PROFILING

1. The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.
2. Paragraph 1 shall not apply if the decision:
  - (a). is necessary for entering into, or performance of, a contract between the data subject and a data controller;
  - (b). is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or
  - (c). is based on the data subject's explicit consent.
3. In the cases referred to in points (a) and (c) of paragraph 2, the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision.
4. Decisions referred to in paragraph 2 shall not be based on special categories of personal data referred to in Article 9(1), unless point (a) or (g) of Article 9(2) applies and suitable measures to safeguard the data subject's rights and freedoms and legitimate interests are in place. . . .

### CHAPTER IV: CONTROLLER AND PROCESSOR

#### SECTION 1: GENERAL OBLIGATIONS

#### ARTICLE 24: RESPONSIBILITY OF THE CONTROLLER

1. Taking into account the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons, the controller shall implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with this Regulation. Those measures shall be reviewed and updated where necessary. . . .



ARTICLE 27: REPRESENTATIVES OF CONTROLLERS OR PROCESSORS NOT ESTABLISHED IN  
THE UNION

1. Where Article 3(2) applies, the controller or the processor shall designate in writing a representative in the Union. . . .

ARTICLE 28: PROCESSOR

1. Where processing is to be carried out on behalf of a controller, the controller shall use only processors providing sufficient guarantees to implement appropriate technical and organisational measures in such a manner that processing will meet the requirements of this Regulation and ensure the protection of the rights of the data subject. . . .

SECTION 2: SECURITY OF PERSONAL DATA

ARTICLE 32: SECURITY OF PROCESSING

1. Taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, the controller and the processor shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk, including inter alia as appropriate:
  - (a). the pseudonymisation and encryption of personal data;
  - (b). the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services;
  - (c). the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident;
  - (d). a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing.
2. In assessing the appropriate level of security account shall be taken in particular of the risks that are presented by processing, in particular from accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to personal data transmitted, stored or otherwise processed.
3. Adherence to an approved code of conduct as referred to in Article 40 or an approved certification mechanism as referred to in Article 42 may be used as an element by which to demonstrate compliance with the requirements set out in paragraph 1 of this Article.
4. The controller and processor shall take steps to ensure that any natural person acting under the authority of the controller or the processor who has access to personal data does not process them except on instructions from the controller, unless he or she is required to do so by Union or Member State law.

ARTICLE 33: NOTIFICATION OF A PERSONAL DATA BREACH TO THE SUPERVISORY  
AUTHORITY

1. In the case of a personal data breach, the controller shall without undue delay and, where feasible, not later than 72 hours after having become aware of it, notify the personal data breach to the supervisory authority competent in accordance with Article 55, unless the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons. Where the notification to the supervisory authority is not made within 72 hours, it shall be accompanied by reasons for the delay.
2. The processor shall notify the controller without undue delay after becoming aware of a personal data breach. . . .

ARTICLE 34: COMMUNICATION OF A PERSONAL DATA BREACH TO THE DATA SUBJECT

1. When the personal data breach is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall communicate the personal data breach to the data subject without undue delay. . . .

SECTION 4: DATA PROTECTION OFFICER

ARTICLE 37: DESIGNATION OF THE DATA PROTECTION OFFICER

1. The controller and the processor shall designate a data protection officer in any case where:
  - (a). the processing is carried out by a public authority or body, except for courts acting in their judicial capacity;
  - (b). the core activities of the controller or the processor consist of processing operations which, by virtue of their nature, their scope and/or their purposes, require regular and systematic monitoring of data subjects on a large scale; or
  - (c). the core activities of the controller or the processor consist of processing on a large scale of special categories of data pursuant to Article 9 and personal data relating to criminal convictions and offences referred to in Article 10. . . .

ARTICLE 38: POSITION OF THE DATA PROTECTION OFFICER

1. The controller and the processor shall ensure that the data protection officer is involved, properly and in a timely manner, in all issues which relate to the protection of personal data.
2. The controller and processor shall support the data protection officer in performing the tasks referred to in Article 39 by providing resources necessary to carry out those tasks and access to personal data and processing operations, and to maintain his or her expert knowledge.
3. The controller and processor shall ensure that the data protection officer does not receive any instructions regarding the exercise of those tasks. He or she shall not be dismissed or penalised by the controller or the processor for performing his tasks. The data

protection officer shall directly report to the highest management level of the controller or the processor. . . .

ARTICLE 39: TASKS OF THE DATA PROTECTION OFFICER

1. The data protection officer shall have at least the following tasks:
  - (a). to inform and advise the controller or the processor and the employees who carry out processing of their obligations pursuant to this Regulation and to other Union or Member State data protection provisions;
  - (b). to monitor compliance with this Regulation, with other Union or Member State data protection provisions and with the policies of the controller or processor in relation to the protection of personal data, including the assignment of responsibilities, awareness-raising and training of staff involved in processing operations, and the related audits; . . .
  - (d). to cooperate with the supervisory authority; . . .

CHAPTER V: TRANSFERS OF PERSONAL DATA TO THIRD COUNTRIES OR INTERNATIONAL ORGANISATIONS

ARTICLE 44: GENERAL PRINCIPLE FOR TRANSFERS

Any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation shall take place only if, subject to the other provisions of this Regulation, the conditions laid down in this Chapter are complied with by the controller and processor, including for onward transfers of personal data from the third country or an international organisation to another third country or to another international organisation. All provisions in this Chapter shall be applied in order to ensure that the level of protection of natural persons guaranteed by this Regulation is not undermined. . . .

ARTICLE 50: INTERNATIONAL COOPERATION FOR THE PROTECTION OF PERSONAL DATA

In relation to third countries and international organisations, the Commission and supervisory authorities shall take appropriate steps to:

- (a). develop international cooperation mechanisms to facilitate the effective enforcement of legislation for the protection of personal data;
- (b). provide international mutual assistance in the enforcement of legislation for the protection of personal data, including through notification, complaint referral, investigative assistance and information exchange, subject to appropriate safeguards for the protection of personal data and other fundamental rights and freedoms;
- (c). engage relevant stakeholders in discussion and activities aimed at furthering international cooperation in the enforcement of legislation for the protection of personal data;

- (d). promote the exchange and documentation of personal data protection legislation and practice, including on jurisdictional conflicts with third countries.

#### CHAPTER VI: INDEPENDENT SUPERVISORY AUTHORITIES

##### SECTION 1: INDEPENDENT STATUS

##### ARTICLE 51: SUPERVISORY AUTHORITY

1. Each Member State shall provide for one or more independent public authorities to be responsible for monitoring the application of this Regulation, in order to protect the fundamental rights and freedoms of natural persons in relation to processing and to facilitate the free flow of personal data within the Union (“supervisory authority”). . . .

##### ARTICLE 52: INDEPENDENCE

1. Each supervisory authority shall act with complete independence in performing its tasks and exercising its powers in accordance with this Regulation.
2. The member or members of each supervisory authority shall, in the performance of their tasks and exercise of their powers in accordance with this Regulation, remain free from external influence, whether direct or indirect, and shall neither seek nor take instructions from anybody. . . .
4. Each Member State shall ensure that each supervisory authority is provided with the human, technical and financial resources, premises and infrastructure necessary for the effective performance of its tasks and exercise of its powers, including those to be carried out in the context of mutual assistance, cooperation and participation in the Board.
5. Each Member State shall ensure that each supervisory authority chooses and has its own staff which shall be subject to the exclusive direction of the member or members of the supervisory authority concerned. . . .

##### ARTICLE 57: TASKS

1. Without prejudice to other tasks set out under this Regulation, each supervisory authority shall on its territory:
  - (a). monitor and enforce the application of this Regulation; . . .
  - (f). handle complaints lodged by a data subject, or by a body, organisation or association in accordance with Article 80, and investigate, to the extent appropriate, the subject matter of the complaint and inform the complainant of the progress and the outcome of the investigation within a reasonable period, in particular if further investigation or coordination with another supervisory authority is necessary; . . .

## ARTICLE 58: POWERS

1. Each supervisory authority shall have all of the following investigative powers:
  - (a). to order the controller and the processor, and, where applicable, the controller's or the processor's representative to provide any information it requires for the performance of its tasks;
  - (b). to carry out investigations in the form of data protection audits; ...
  - (d). to notify the controller or the processor of an alleged infringement of this Regulation;
  - (e). to obtain, from the controller and the processor, access to all personal data and to all information necessary for the performance of its tasks;
  - (f). to obtain access to any premises of the controller and the processor, including to any data processing equipment and means, in accordance with Union or Member State procedural law.
2. Each supervisory authority shall have all of the following corrective powers:
  - (a). to issue warnings to a controller or processor that intended processing operations are likely to infringe provisions of this Regulation;
  - (b). to issue reprimands to a controller or a processor where processing operations have infringed provisions of this Regulation;
  - (c). to order the controller or the processor to comply with the data subject's requests to exercise his or her rights pursuant to this Regulation;
  - (d). to order the controller or processor to bring processing operations into compliance with the provisions of this Regulation, where appropriate, in a specified manner and within a specified period;
  - (e). to order the controller to communicate a personal data breach to the data subject;
  - (f). to impose a temporary or definitive limitation including a ban on processing;
  - (g). to order the rectification or erasure of personal data or restriction of processing pursuant to Articles 16, 17 and 18 and the notification of such actions to recipients to whom the personal data have been disclosed pursuant to Article 17(2) and Article 19; ...
  - (i). to impose an administrative fine pursuant to Article 83, in addition to, or instead of measures referred to in this paragraph, depending on the circumstances of each individual case;
  - (j). to order the suspension of data flows to a recipient in a third country or to an international organisation. ...

## SECTION 3: EUROPEAN DATA PROTECTION BOARD

## ARTICLE 68: EUROPEAN DATA PROTECTION BOARD

1. The European Data Protection Board (the “Board”) is hereby established as a body of the Union and shall have legal personality.
2. The Board shall be represented by its Chair.
3. The Board shall be composed of the head of one supervisory authority of each Member State and of the European Data Protection Supervisor, or their respective representatives.

## ARTICLE 69: INDEPENDENCE

1. The Board shall act independently when performing its tasks or exercising its powers pursuant to Articles 70 and 71. . . .

## ARTICLE 70: TASKS OF THE BOARD

1. The Board shall ensure the consistent application of this Regulation. To that end, the Board shall, on its own initiative or, where relevant, at the request of the Commission, in particular:
  - (a). monitor and ensure the correct application of this Regulation in the cases provided for in Articles 64 and 65 without prejudice to the tasks of national supervisory authorities;
  - (b). advise the Commission on any issue related to the protection of personal data in the Union, including on any proposed amendment of this Regulation;
  - (c). advise the Commission on the format and procedures for the exchange of information between controllers, processors and supervisory authorities for binding corporate rules;
  - (d). issue guidelines, recommendations, and best practices on procedures for erasing links, copies or replications of personal data from publicly available communication services as referred to in Article 17(2);
  - (e). examine, on its own initiative, on request of one of its members or on request of the Commission, any question covering the application of this Regulation and issue guidelines, recommendations and best practices in order to encourage consistent application of this Regulation;
  - (f). issue guidelines, recommendations and best practices in accordance with point (e) of this paragraph for further specifying the criteria and conditions for decisions based on profiling pursuant to Article 22(2); . . .

## CHAPTER VIII; REMEDIES, LIABILITY AND PENALTIES

## ARTICLE 77: RIGHT TO LODGE A COMPLAINT WITH A SUPERVISORY AUTHORITY

1. Without prejudice to any other administrative or judicial remedy, every data subject shall have the right to lodge a complaint with a supervisory authority, in particular in the Member State of his or her habitual residence, place of work or place of the alleged



infringement if the data subject considers that the processing of personal data relating to him or her infringes this Regulation.

2. The supervisory authority with which the complaint has been lodged shall inform the complainant on the progress and the outcome of the complaint including the possibility of a judicial remedy pursuant to Article 78.

ARTICLE 78: RIGHT TO AN EFFECTIVE JUDICIAL REMEDY AGAINST A SUPERVISORY  
AUTHORITY

1. Without prejudice to any other administrative or non-judicial remedy, each natural or legal person shall have the right to an effective judicial remedy against a legally binding decision of a supervisory authority concerning them.
2. Without prejudice to any other administrative or non-judicial remedy, each data subject shall have the right to an effective judicial remedy where the supervisory authority which is competent pursuant to Articles 55 and 56 does not handle a complaint or does not inform the data subject within three months on the progress or outcome of the complaint lodged pursuant to Article 77.
3. Proceedings against a supervisory authority shall be brought before the courts of the Member State where the supervisory authority is established.
4. Where proceedings are brought against a decision of a supervisory authority which was preceded by an opinion or a decision of the Board in the consistency mechanism, the supervisory authority shall forward that opinion or decision to the court.

ARTICLE 79: RIGHT TO AN EFFECTIVE JUDICIAL REMEDY AGAINST A CONTROLLER OR  
PROCESSOR

1. Without prejudice to any available administrative or non-judicial remedy, including the right to lodge a complaint with a supervisory authority pursuant to Article 77, each data subject shall have the right to an effective judicial remedy where he or she considers that his or her rights under this Regulation have been infringed as a result of the processing of his or her personal data in non-compliance with this Regulation.
2. Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual residence, unless the controller or processor is a public authority of a Member State acting in the exercise of its public powers.

ARTICLE 80: REPRESENTATION OF DATA SUBJECTS

1. The data subject shall have the right to mandate a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has

statutory objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data to lodge the complaint on his or her behalf, to exercise the rights referred to in Articles 77, 78 and 79 on his or her behalf, and to exercise the right to receive compensation referred to in Article 82 on his or her behalf where provided for by Member State law.

2. Member States may provide that any body, organisation or association referred to in paragraph 1 of this Article, independently of a data subject's mandate, has the right to lodge, in that Member State, a complaint with the supervisory authority which is competent pursuant to Article 77 and to exercise the rights referred to in Articles 78 and 79 if it considers that the rights of a data subject under this Regulation have been infringed as a result of the processing. . . .

#### ARTICLE 82: RIGHT TO COMPENSATION AND LIABILITY

1. Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.
2. Any controller involved in processing shall be liable for the damage caused by processing which infringes this Regulation. A processor shall be liable for the damage caused by processing only where it has not complied with obligations of this Regulation specifically directed to processors or where it has acted outside or contrary to lawful instructions of the controller.
3. A controller or processor shall be exempt from liability under paragraph 2 if it proves that it is not in any way responsible for the event giving rise to the damage.
4. Where more than one controller or processor, or both a controller and a processor, are involved in the same processing and where they are, under paragraphs 2 and 3, responsible for any damage caused by processing, each controller or processor shall be held liable for the entire damage in order to ensure effective compensation of the data subject.
5. Where a controller or processor has, in accordance with paragraph 4, paid full compensation for the damage suffered, that controller or processor shall be entitled to claim back from the other controllers or processors involved in the same processing that part of the compensation corresponding to their part of responsibility for the damage, in accordance with the conditions set out in paragraph 2.
6. Court proceedings for exercising the right to receive compensation shall be brought before the courts competent under the law of the Member State referred to in Article 79(2).

## ARTICLE 83: GENERAL CONDITIONS FOR IMPOSING ADMINISTRATIVE FINES

1. Each supervisory authority shall ensure that the imposition of administrative fines pursuant to this Article in respect of infringements of this Regulation referred to in paragraphs 4, 5 and 6 shall in each individual case be effective, proportionate and dissuasive.
2. Administrative fines shall, depending on the circumstances of each individual case, be imposed in addition to, or instead of, measures referred to in points (a) to (h) and (j) of Article 58(2). When deciding whether to impose an administrative fine and deciding on the amount of the administrative fine in each individual case due regard shall be given to the following:
  - (a). the nature, gravity and duration of the infringement taking into account the nature scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them;
  - (b). the intentional or negligent character of the infringement;
  - (c). any action taken by the controller or processor to mitigate the damage suffered by data subjects;
  - (d). the degree of responsibility of the controller or processor taking into account technical and organisational measures implemented by them pursuant to Articles 25 and 32;
  - (e). any relevant previous infringements by the controller or processor;
  - (f). the degree of cooperation with the supervisory authority, in order to remedy the infringement and mitigate the possible adverse effects of the infringement;
  - (g). the categories of personal data affected by the infringement;
  - (h). the manner in which the infringement became known to the supervisory authority, in particular whether, and if so to what extent, the controller or processor notified the infringement;
  - (i). where measures referred to in Article 58(2) have previously been ordered against the controller or processor concerned with regard to the same subject-matter, compliance with those measures;
  - (j). adherence to approved codes of conduct pursuant to Article 40 or approved certification mechanisms pursuant to Article 42; and
  - (k). any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement.
3. If a controller or processor intentionally or negligently, for the same or linked processing operations, infringes several provisions of this Regulation, the total amount of the administrative fine shall not exceed the amount specified for the gravest infringement.
4. Infringements of the following provisions shall, in accordance with paragraph 2, be subject to administrative fines up to 10 000 000 EUR, or in the case of an undertaking, up to 2 % of the total worldwide annual turnover of the preceding financial year, whichever is higher:

- (a). the obligations of the controller and the processor pursuant to Articles 8, 11, 25 to 39 and 42 and 43; ...
- 5. Infringements of the following provisions shall, in accordance with paragraph 2, be subject to administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher:
  - (a). the basic principles for processing, including conditions for consent, pursuant to Articles 5, 6, 7 and 9;
  - (b). the data subjects' rights pursuant to Articles 12 to 22;
  - (c). the transfers of personal data to a recipient in a third country or an international organisation pursuant to Articles 44 to 49;
  - (d). any obligations pursuant to Member State law adopted under Chapter IX;
  - (e). non-compliance with an order or a temporary or definitive limitation on processing or the suspension of data flows by the supervisory authority pursuant to Article 58(2) or failure to provide access in violation of Article 58(1).
- 6. Non-compliance with an order by the supervisory authority as referred to in Article 58(2) shall, in accordance with paragraph 2 of this Article, be subject to administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher. ...

#### CHAPTER IX: PROVISIONS RELATING TO SPECIFIC PROCESSING SITUATIONS

##### ARTICLE 85: PROCESSING AND FREEDOM OF EXPRESSION AND INFORMATION

- 1. Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression. ...

#### CHAPTER XI: FINAL PROVISIONS ...

##### ARTICLE 99: ENTRY INTO FORCE AND APPLICATION

This Regulation shall be binding in its entirety and directly applicable in all Member States. ...

Done at Brussels, 27 April 2016.

### Chinese Law

#### Chinese Civil Code

##### ARTICLE 1033

No organization or individual should engage in the following conducts unless permitted by law or consent was given by the right holder:

- (1). interfering private peaceful life through ways of telephoning, text messaging, instant messaging, emailing, faxing and so forth;
- (2). entering, videotaping, peeking into the private space of others such as residence and hotel rooms;
- (3). videotaping, peeking, eavesdropping and publicizing others' private activities;
- (4). videotaping and peeking at the intimate body parts of others;
- (5). processing others' confidential information;
- (6). other ways to infringe others' right to privacy.

#### ARTICLE 1034

A natural person's personal information is protected by law.

Personal information is all sorts of information that could be used to identify a natural person; such information that records data in either an electronic or other form that could be used to identify a person either on its own or in combination with other information; such data that include a natural person's name, date of birth, personal identification number, biological identification data, residential address, telephone numbers, emails and tracking information and so forth.

The confidential part of the personal information is subject to the rules on privacy; without specific rules, other parts of the personal information are subject to personal data protection rules.

#### ARTICLE 1035

Processing a natural person's personal data must accord with the principles of legality, justness, and necessity; processing shall not be over-done and is subject to the following conditions:

- (1). consent of the natural person or his legal guardian except when otherwise provided by law and administrative regulation;
- (2). open processing of information;
- (3). express statement of the purpose, methods and scope of the data processing;
- (4). compliance with law, administrative regulation and agreements between both parties.

Processing personal information includes collecting, storing, using, tampering, transmitting, supplying and publicizing.

#### ARTICLE 1036

A processor of the personal data of a natural person is exempt from civil liabilities in the following circumstances:

- (1). reasonable conduct within the scope of consent given by the said natural person or his legal guardian;
- (2). reasonable processing of legal information that the said natural person has previously voluntarily publicized or was already public except when the said natural person expressly refused or processing of the said information will cause him significant harm;

- (3). other reasonable conducts carried out to preserve public interests or the legal interests of the said natural person.

#### ARTICLE 1037

A natural person is allowed to look up or copy his personal data from the data processor according to law; he has the right to object when the data was incorrect and can request necessary and timely measures be adopted to have the data corrected.

When a natural person discovers that a data processor has processed the data in breach of the law, administrative regulations and mutual agreement, he has the right to have the processor remove that data in a timely manner.

#### ARTICLE 1038

Data processors may not leak, tamper, collect or store personal data; without a natural person's consent, they may not provide personal data to others; however, such data does not include those that have been tampered with and could not have been linked to a specific individual.

Data processors shall employ technical and other necessary measures to ensure the safety of personal data they collected and stored. They shall adopt remedial measures when personal data is or might have already been leaked, tampered with or lost. They shall also inform the said natural person and report the incident to the supervisory authority.

#### ARTICLE 1039

Personnel from state government agencies shall keep private and personal data of a natural person acquired while performing their duty in confidence, and may not leak such information or provide it to others illegally.

## 4. Purely Economic Harm

### a. Liability in Principle for Purely Economic Harm

#### French Law

As we have seen, the French Civil Code Articles 1240–1 simply say that the defendant is liable for harm (*dommage*). Supposedly, then, French law is equally simple. The defendant is liable for harm, whether it is economic or not.

#### **Cour de cassation, 2<sup>e</sup> ch. civ., May 8, 1970, Bull. civ. 1970.II no. 160**

“[A] gas pipe of the *Compagnie française du méthane* which supplied the factory of the *Allamignon Frères et Lacroix* company was broken by a bulldozer in the course of work done by the entrepreneur Lafarge.” The court held Lafarge liable, noting with approval that the *Cour d’appel* had found “that the harm suffered by *Allamignon Frères et Lacroix* company



appeared to be the direct consequence of the break in the pipe since this damage had caused the interruption of the activity of the factory.”

**Cour de cassation, ch. comm., October 17, 1984, JCP 1985.II.20458**

Plaintiff company contributed capital to N. company after examining the financial statements prepared by defendants who were accountants. The financial statements were incorrect: company N. in fact had a deficit in assets of 480,000 francs. Company N. became insolvent. The court held plaintiff could recover from defendants.

**Cour d'appel, Colmar, April 20, 1955, D. 1956.J.723**

Kemp was under contract to play for “le Football Club de Metz.” When he was killed in a traffic accident for which defendant was responsible, the Club sued to recover the financial losses it had incurred as a result. It claimed that the team had been put in disarray and that it had lost the fee it was entitled to charge to release Kemp from his contract and allow him to play for another club. While the contract was for the season, it was renewed every year and could only be canceled under strictly regulated conditions. The Club had already turned down offers from other clubs, one for 2,000,000 francs. To obtain a player of comparable standing the Club would have to pay a similar fee. Before Kemp’s death the Club had been ranked tenth among eighteen teams in the national division. The season following his death, it fell to sixteenth place. The year following it fell to eighteenth place and was expelled from the national division, so that it then had to play in the “second division.” The court held that the Club could recover and remanded to determine the amount it had lost. The court noted: “every person, even an organization recognized by the law as a person (*même morale*) who is the victim of harm (*dommage*), whatever be its nature, has the right to obtain compensation from one who caused it by his fault or by the act of an object that he has in his custody (*garde*).” Here the Club could recover because the harm was “certain.”

**Cour de cassation, 2<sup>e</sup> ch. civ., April 28, 1965, D.S. 1965.J.777**

Certain buses of the plaintiff, the Marseilles transit authority, were delayed by a traffic accident for which the defendant was responsible: his car hit a motorcycle blocking the street. The plaintiff sued to recover the fares it had lost because its potential customers grew tired of waiting and proceeded to their destinations on foot or by taxi. The *Cour d'appel* allowed the plaintiff to recover noting simply that the harm was “certain”; it was “neither hypothetical nor indirect.” The damages awarded were 37.07 francs.

**Note.** Professor Paul Esmein observed that this was not the first time that the Marseilles transport authority had taken such a case all the way to the *Cour de cassation*. He cited two decisions of July 11, 1963 (Gaz. Pal 1963 2.389; D. 1964 Somm. 26).

**Note.** Consider whether the next two cases are consistent with the previous ones, and with the general principle that the plaintiff can recover for economic harm.

**Cour de cassation, 2<sup>e</sup> ch. civ., June 12, 1987, JCP 1987.IV.286**

The plaintiff was a partnership whose “president-general director” was injured in an accident for which the defendant was responsible. The plaintiff sued to recover for the financial harm that it had suffered because the injured man was unable to consummate deals which were then under negotiation on behalf of the partnership. The plaintiff objected that the *Cour d’appel* had denied relief without considering whether the partnership had a serious chance to conclude these contracts. The *Cour de cassation* upheld the decision below on the ground that the harm was not “certain” since their conclusion was “hypothetical.”

**Cour de cassation, 2<sup>e</sup> ch. civ., February 21, 1979, JCP 1979. IV.145**

The plaintiff had loaned money to a husband and wife who were both killed in an accident for which defendant was responsible. Plaintiff could not recover the debt from their estate because it was insufficient, nor from the heirs of the couple, as would otherwise be permitted under French law, since they had renounced the inheritance, as they had the right to do. The plaintiff sued to recover it from the defendant. The court held that they could not recover because the causal relationship between the accident and the loss was insufficiently direct. The loss was also due to the decision of the heirs to renounce the right to the inheritance. It was also due to the failure of the creditor to insist that the debtors buy a life insurance policy.

## **b. No Liability in Principle for Purely Economic Harm**

### **i. Origins**

In the late nineteenth and early twentieth century, a rule emerged, first in Germany, and then in England and the United States, that the defendant was not liable for “pure economic harm” caused to the plaintiff. “Pure economic harm” is harm unaccompanied by physical damage to the plaintiff’s person or property.

In Germany, the idea that the plaintiff should not be able to recover for any sort of harm was suggested by the Roman texts which remained in force in much of Germany until 1900. As we have seen, in almost all the Roman examples, the plaintiff has lost the use of a physical object even if it was not physically injured: for example, he could recover for the loss of a cup whether it was smashed or thrown into a river where he could not get it back. In the universities, most jurists concluded that the defendant should

be liable only for harm to defendant's person and property.<sup>1</sup> Some merely pointed to the texts. Others, such as Rudolf von Ihering, argued that liability would be too extensive unless limited in some way:

Where would it lead if everyone could be sued, not only for intentional wrongdoing (*dolus*) but for gross negligence (*culpa lata*) absent a contractual relationship! A ill-advised statement, a rumor passed on, a false report, bad advice, a poor decision, a recommendation for an unfit serving maid by her former employer, information given at the request of a traveler about the way, the time, and so forth – in short, anything and everything would make one liable to compensate for the damage that ensued if their were gross negligence despite one's good faith ...<sup>2</sup>

Nevertheless, by the end of the century, it seemed as though this approach would be abandoned for a broader one more like the French. It had been challenged by jurists such as Otto von Gierke and Josef Kohler who argued that the defendant should be liable for violation of a panoply of rights that concerned plaintiff's freedom of action and personality.<sup>3</sup> In 1888, then the *Reichsgericht* – the highest German court for civil matters – allowed a plaintiff to recover whose person and property had not been injured. He had been temporarily unable to sell a product because the defendant had been “negligent at least” in raising a claim of patent infringement.<sup>4</sup> Indeed, in their first draft, the First Commission charged with drafting the German Civil Code proposed the following provision:

One who has caused another harm (*Schaden*) by intention or by negligence by an unlawful (*widerrechtlich*) act or omission is obligated to make him compensation.<sup>5</sup>

The reason, according to the Commission, was that:

Any act is not permitted in the sense of the civil law by which anyone impinges and violates the sphere of rights of another unlawfully in an unauthorized manner. For the sphere of rights of each person must be

1. For example, B. Windscheid, *Lehrbuch des Pandektenrechts* 2 (7th edn., 1891), §§ 451, 455; K.A. von Vangerow, *Lehrbuch der Pandekten* 3 (6th edn., 1863), § 681 n. 1.I (3); Arndts, *Lehrbuch der Pandekten* (14th edn., 1889), § 324. See Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990), 1036–8.

2. R. von Ihering, “Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen,” *Jherings Jahrbücher* 4 (1861), 12–13.

3. O. von Gierke, *Der Entwurf eines bürgerlichen Gesetzbuches und das deutsche*

*Recht* (1889), 264; O. von Gierke, *Deutsches Privatrecht* 3 (1917), 885–7; J. Kohler, “Recht und Prozen,” *Zeitschrift für das privatrechtliche Recht der Gegenwart* 14 (1887), 1 at 4–5; J. Kohler, *Lehrbuch des bürgerlichen Rechts* 1 (1904), § 132; 2 (1906), § 190. See K.-H. Fezer, *Teilhabe und Verantwortung* (1986), 456–65.

4. Reichsgericht, Dec. 3, 1888, RGZ 22, 208 at 209.

5. *Teilentwurf des Vorentwurfs zu einem BGB, Recht der Schuldverhältnisse* no. 15, § 1.

respected and left untouched by all other persons; whoever acts contrary to this general command of the law without there being any special grounds for justification has by that alone committed a tortious act.<sup>6</sup>

Why, then, did the German Civil Code allow the plaintiff to recover only for the types of harm enumerated in what is now § 823? At one of its early meetings, the First Commission discussed “what is to be understood as the ‘violation of a right:’ only the violation of a right which receives an absolute protection or any violation of the legal order by an act prohibited by law as contrary to the legal order for the sake of himself.”<sup>7</sup> The Commission eventually chose the first of these alternatives. For the Commission, it seemed to follow that the violation of rights such as person and property is tortious because such rights are “absolute” in the sense that they could be asserted against anyone. In contrast, a “right of obligation” (*obligatorisches Recht*) such as a contract right was a right only against the other party to the contract. The Commission noted that a tort was not committed by the violation of such a right because it “cannot be violated by anyone except the debtor [i.e., the party who is bound].”<sup>8</sup> Consequently, the Commission added a final sentence to clarify the type of right that must be violated. It went without saying that the paradigm case of a violation of a right was an interference with property. The Commission added, “The violation of life, body, health, freedom and honor are also to be regarded as the violation of a right in the sense of the previous provision.” This language had mixed fortunes before it passed into what is now § 823(1). At one point it was deleted as unnecessary. Later it was put back, with an explicit mention of the right of property and the subtraction of “honor.” The phrase “or similar right” (*sonstiges Recht*) was added because it had proven impossible to enumerate all of the ownership-like “absolute rights” that a defendant could violate.

The drafters had not been discussing “pure economic harm.” They were distinguishing between “absolute rights,” good against all the world, and “relative rights,” good against a particular party. But if one could not recover against a third party for interference with these relative rights (let alone mere economic opportunities), then it followed that one could not recover for what we now call pure economic harm. The German courts reached that conclusion soon after the Civil Code came into force. In 1901, it held that a defendant who interfered with the plaintiff’s economic freedom of action had not violated his “freedom” within the meaning of § 823(1).<sup>9</sup> In 1904, it held that economic harm (*Vermögensschädigung*) was not in itself harm to a right protected by § 823(1).<sup>10</sup>

In Germany, then, the rule against recovery for pure economic harm originally rested on what today would seem a conceptualistic argument: if A

6. W. Schubert, ed., *Die Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuches, Recht der Schuldverhältnisse, Teil 1, Allgemeiner Teil* 1 (1980), 657.

7. *Protokolle* 1: 971–2.

8. *Protokolle* 1: 984, 986–7.

9. Reichsgericht, Apr. 11, 1901, RGZ 48, 114.

10. Reichsgericht, Feb. 27, 1904, RGZ 58, 24.

interferes with B's performance of a duty that B owes to C, then C cannot recover against A because C was owed the duty by B, not by A. The same argument surfaced in England in several leading treatises on tort law written in the early twentieth century. By that time, in some cases, English courts had denied recovery for what we today would call pure economic loss. In 1875, in *Cattle v. The Stockton Waterworks Co.*,<sup>11</sup> plaintiff did not recover his extra expenses building a tunnel when defendant's negligence made construction more difficult by flooding of a third party's land. In 1877, in *Simpson & Co. v. Thomson*,<sup>12</sup> an insurance company was denied recovery for the insurance money it had to pay for insured cargo that was lost when one of defendant's ships negligently struck one of his own ships containing the cargo. In 1908, in *Anglo-Algerian Steamship Co. Ltd. v. The Houlder Line, Ltd.*,<sup>13</sup> plaintiff could not recover for the loss he suffered when his ship could not use a third party's dock which the defendant had negligently damaged. But the courts did not say the plaintiff could not recover because the loss was economic.<sup>14</sup> They said that if he could recover, liability would extend to too many possible plaintiffs.<sup>15</sup> In *Cattle* and *Anglo-Algerian Steamship*, they also said that the damage was too "remote."<sup>16</sup>

But then some of the earliest systematic English treatises on torts reinterpreted these cases. They used the same conceptualistic argument that had appealed to the German drafters. According to J.F. Clerk and W.H.B. Lindsell, *Cattle* stood for the principle that "interference with rights of service or with rights of contract generally is not actionable."<sup>17</sup> According to William Gordon and Walter Griffiths, who edited the eighth edition of C.G. Addison's treatise on contracts, the principle was that the defendant is liable only "where there is an obligation toward the plaintiff."<sup>18</sup> According to Sir John Salmond, in *Cattle*, the principle was that "nuisance is actionable only at the suit of the occupier or owner of the land affected by it; not at the suit of strangers whatever pecuniary interest they may have in the non-existence of the nuisance."<sup>19</sup> In *Anglo-Algerian Steamship*, the principle was that "[n]egligent injury to property gives an action to the owner of that property, or to other persons having some proprietary interest therein, but not to mere strangers who are thereby subjected to pecuniary loss."<sup>20</sup> Both cases were instances of *damnum sine iniuria*.<sup>21</sup> In later editions, he generalized the principle: "He who does a wrongful act is liable only to the person whose rights are violated."<sup>22</sup>

11. (1875) L.R. 10 Q.B. 453.

12. [1877] 3 A.C. 279 (H.L.).

13. [1908] 1 K.B. 659.

14. As noted by R. Bernstein, *Economic Loss* (2nd edn., 1998), 11.

15. L.R. 10 Q.B. at 457; [1877] 3 A.C. at 289; [1908] 1 K.B. at 668.

16. L.R. 10 Q.B. at 457; [1908] 1 K.B. at 665.

17. J.F. Clerk and W.H.B. Lindsell, *The Law of Torts* (W. Paine, ed., 3rd edn., 1904), 11. At another point they do suggest that the

case turned on the remoteness of the damage. *Ibid.* 133.

18. C.G. Addison, *A Treatise on the Law of Torts or Wrongs and their Remedies* (W.E. Gordon and W.H. Griffiths, eds., 8th edn., 1906), 701.

19. J.W. Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (2nd edn., 1910), 10.

20. *Ibid.* 10.

21. *Ibid.* 8, 11.

22. Salmond, *The Law of Torts* (W.T.S. Stallybrass, ed., 8th edn., 1934), 133.

This approach was then picked up by the courts. It was adopted by Justice Hamilton in 1911 in deciding the case of *La Société Anonyme de Remorquage à Hélice v. Bennets*.<sup>23</sup> The defendant had negligently rammed and sank a ship owned by a third party which the plaintiff had been towing under contract. The plaintiff was not allowed to recover the money he would have made under the contract. The plaintiff's attorney had argued that he should recover because the damage was not "too remote."<sup>24</sup> Instead of arguing whether it was or not, the defendant's attorney said, in the words of Salmon, that "[a]lthough there was a breach of duty followed by damage to the owner of the tow, there was only iniuria sine damno so far as the tug was concerned."<sup>25</sup> Justice Hamilton agreed. Although the headnote to the case said that the plaintiff's harm was not the "direct consequence of the negligence," Hamilton said that the plaintiffs must "shew not only an iniuria, namely, the breach of the defendant's obligation, but also damnum to themselves in the sense of damage recognized by law."<sup>26</sup>

Like the treatise writers, he cited *Cattle* as authority. This same explanation was given in 1922, in *Elliott Steam Tug Co. Ltd. v. Shipping Controller*. Plaintiff was not allowed to recover in tort for profits he lost when the Admiralty requisitioned his tug "not because the loss of profits during repairs is not the direct consequence of the wrong, but because the common law rightly or wrongly does not recognise him as able to sue for such an injury to his merely contractual rights."<sup>27</sup>

In the United States, Oliver Wendell Holmes gave the same explanation of why plaintiff could not recover in his famous opinion in *Robins Dry Dock & Repair Co. v. Flint*.<sup>28</sup> While the boat that plaintiff had chartered from a third party was moored at defendant's dock for maintenance, the defendant negligently damaged the propeller. Plaintiff's thus lost the use of the boat for two weeks while repairs were made. Holmes said:

The injury to the propeller was no wrong to the respondents but only to those to whom it belonged. But suppose that the respondent's loss flowed directly from that source. Their loss arose only through their contract with the owners – and while intentionally to bring about a breach of contract may give rise to a cause of action [citation omitted], no authority need be cited to how that, as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong [citation omitted]. The law does not spread its protection so far. A good statement, applicable here, will be found in *Elliott Steam Tug Co., Ltd. v. The Shipping Controller* [1922] 1 K.B. 127, 139, 140 . . .

Today, the argument that had influenced the German drafters, the English treatise writers, and the English and American courts seems

23. [1911] 1 K.B. 243.

24. [1911] 1 K.B. at 245.

25. [1911] 1 K.B. at 246.

26. [1911] 1 K.B. at 248.

27. [1922] 1 K.B. 127, 140.

28. 275 U.S. 302 (1927).



conceptualistic. It draws a conclusion about who should be liable for what from abstract definitions of the persons to whom rights are owed. Judges and legal scholars today prefer to think functionally, about what the law should be trying to accomplish. Nevertheless, German, English, and American courts still say that in many situations, one cannot recover for pure economic harm.

## ii. Note on Chinese Law

### Tort Liability Law of the People's Republic of China

#### ARTICLE 2

Civil rights and interests within the terms of this law shall include the right to life, the right to health, the right to one's name, the right to reputation, the right to honor, the right to one's image, the right of privacy, to marital autonomy, to guardianship, to ownership, to usufruct, to a security interest, to copyright, to a patent right, to the exclusive right to use a trademark, to the right to discovery, to equities, to the right of succession, and to other personal and property rights and interests.

#### ARTICLE 6

A person is liable in tort for the infringement of another's civil rights through his fault.

**Note.** It is not clear from Article 2 and Article 6 of the Tort Liability Law whether one can recover for economic harm absent physical harm. Under Article 2, only personal and property rights are civil rights and interests protected by the law. Under Article 6, one can recover for harm to any civil right.

Most Chinese judges are unaware of the rule excluding recovery of pure economic harm. There are less than two dozen cases in which judges limited the recovery of pure economic harm. Most Chinese judges would allow recovery of pure economic loss so long as the damage is foreseeable and not hypothetical. Chinese Civil Code, Article 1165 endorsed Article 6 of the Tort Liability Law, taking the French approach which had already had great influence in existing judicial practice. The current contradiction between Article 2 and Article 6 of the Tort Liability Law will end as of January 1, 2021 when the statute is superseded by the Civil Code.

### Chinese Civil Code

#### ARTICLE 1165-1

Where an actor harmed another's civil interests and caused damage through his fault, he shall be liable in tort.

**Chen Lidan v. Zhou Xuegang et al., 陈丽丹诉周学刚 (2016) 黔0303民初5005号 (2016)Qian 0303 Min Chu No. 5005**

Plaintiff, Chen, was injured in a traffic accident while traveling in a coach bus and sued the transportation company and the insurer for

damages regarding physical injuries, and the cost of a booked trip. Huichuang district court of Zunyi municipality awarded damages for medical expenses but not the cost of the booked tour. The court said that pure economic loss cannot generally be recovered unless clearly prescribed by law.

The court reasoned that “[e]ven though the accident might have contributed to the loss of the tour contract; the defendant, when committing the tort, did not have the intention to harm the plaintiff’s contractual rights in mind. Imagine what would happen, it said, if we extend the liability. Suppose the accident caused a traffic jam, which led to passengers missing flights, to miss the signing of an important business contract that in turn led to severe financial loss, to truck drivers unable to deliver goods on time. Are we still going to hold the tortfeasor liable when such losses result from his negligent conduct? Recovery of pure economic loss is uncertain and unforeseeable when it comes to the exact amount of damage and the extent of the victims. Therefore, such a recovery shall be strictly limited and tortfeasors shall not be held liable for pure economic loss unless otherwise prescribed by law.”

### **iii. Physical Harm to a Third Party’s Property Anglo-American Law**

#### **Spartan Steel & Alloys Ltd v. Martin & Co (Contractors) Ltd, [1973] 1 Q.B. 27 (C.A.)**

“The plaintiffs manufactured stainless steel alloys at a factory which was directly supplied with electricity by a cable from a power station. The factory worked 24 hours a day. Continuous power was required to maintain the temperature in a furnace in which metal was melted. The defendants’ employees, who were working on a near-by road, damaged the cable whilst using an excavating shovel. The electricity board shut off the power supply to the factory for 14 1/2 hours until the cable was mended. There was a danger that a ‘melt’ in the furnace might solidify and damage the furnace’s lining, so the plaintiffs poured oxygen on to the ‘melt’ and removed it, thus reducing its value by £368. If the supply had not been cut off, they would have made a profit of £400 on the ‘melt’, and £1,767 on another four ‘melts’, which would have been put into the furnace. They claimed damages from the defendants in respect of all three sums. The defendants admitted that their employees had been negligent, but disputed the amount of their liability.”

Lord Denning M.R. “The more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say: ‘There was no duty.’ In others I say: ‘The damage was too remote.’ So much so that I think the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable . . .

So I turn to the relationship in the present case. It is of common occurrence. The parties concerned are the electricity board who are under a statutory duty to maintain supplies of electricity in their district; the inhabitants of the district, including this factory, who are entitled by statute to a continuous supply of electricity for their use; and the contractors who dig up the road. Similar relationships occur with other statutory bodies, such as gas and water undertakings. The cable may be damaged by the negligence of the statutory undertaker, or by the negligence of the contractor, or by accident without any negligence by anyone; and the power may have to be cut off whilst the cable is repaired. Or the power may be cut off owing to a short-circuit in the power house; and so forth. If the cutting off of the supply causes economic loss to the consumers, should it as matter of policy be recoverable? And against whom?

The first consideration is the position of the statutory undertakers. If the board do not keep up the voltage or pressure of electricity, gas or water – or, likewise, if they shut it off for repairs – and thereby cause economic loss to their consumers, they are not liable in damages, not even if the cause of it is due to their own negligence. The only remedy (which is hardly ever pursued) is to prosecute the board before the justices. Such is the result of many cases . . .

The second consideration is the nature of the hazard, namely, the cutting of the supply of electricity. This is a hazard which we all run. It may be due to a short circuit, to a flash of lightning, to a tree falling on the wires, to an accidental cutting of the cable, or even to the negligence of someone or other. And when it does happen, it affects a multitude of persons; not as a rule by way of physical damage to them or their property, but by putting them to inconvenience, and sometimes to economic loss. The supply is usually restored in a few hours, so the economic loss is not very large. Such a hazard is regarded by most people as a thing they must put up with – without seeking compensation from anyone. Some there are who install a stand-by system. Others seek refuge by taking out an insurance policy against breakdown in the supply. But most people are content to take the risk on themselves. When the supply is cut off, they do not go running round to their solicitor. They do not try to find out whether it was anyone's fault. They just put up with it. They try to make up the economic loss by doing more work next day. This is a healthy attitude which the law should encourage.

The third consideration is this. If claims for economic loss were permitted for this particular hazard, there would be no end of claims. Some might be genuine, but many might be inflated, or even false. A machine might not have been in use anyway, but it would be easy to put it down to the cut in supply. It would be well-nigh impossible to check the claims. If there was economic loss on one day, did the applicant do his best to mitigate it by working harder next day? And so forth. Rather than expose claimants to such temptation and defendants to such hard labour – on comparatively small claims – it is better to disallow economic loss altogether, at any rate when it stands alone, independent of any physical damage.

The fourth consideration is that, in such a hazard as this, the risk of economic loss should be suffered by the whole community who suffer the losses – usually many but comparatively small losses – rather than on the one pair of shoulders, that is, on the contractor on whom the total of them, all added together, might be very heavy.

The fifth consideration is that the law provides for deserving cases. If the defendant is guilty of negligence which cuts off the electricity supply and causes actual physical damage to person or property, that physical damage can be recovered [citation omitted] and also any economic loss truly consequential on the material damage [citation omitted]. Such cases will be comparatively few. They will be readily capable of proof and will be easily checked. They should be and are admitted.

These considerations lead me to the conclusion that the plaintiffs should recover for the physical damage to the one melt (£368), and the loss of profit on that melt consequent thereon (£400); but not for the loss of profit on the four melts (£1,767), because that was economic loss independent of the physical damage. I would, therefore, allow the appeal and reduce the damages to £768.”

***Note on Law in the United States, Australia, and Canada.***

American courts have denied recovery in similar cases; e.g., *Byrd v. English*, 43 S.E. 419 (Ga. 1902). Defendant, by negligently excavating, severed the power lines that served plaintiff's factory. The power lines belonged to the Georgia Electric Light Co., which was under contract to provide plaintiff with power. The court held that plaintiff could not recover for the profit he lost when his work was delayed.

These cases, and those cited in the historical introduction, represent the traditional position in England and the United States. Australian and Canadian courts have recently taken what seems to be a different approach. In *Canadian National Railway Co. v. Norsk Pacific Steamship Co. Ltd.*, [1992] 91 D.L.R. 4th 289, the plaintiff's barge damaged a bridge over the Fraser River. Even though the bridge was owned by a third party, the railroad recovered the costs it incurred rerouting its traffic. In *Caltex Oil Ltd. v. The Dredge Willemstad* [1976–77] 136 CLR 529, a dredger broke the underwater pipeline that the plaintiff, an oil company, had been using to transport its oil underneath Botany Bay. Even though the pipeline had belonged to a third party, the plaintiff recovered the cost of transporting its oil around the bay.

**German Law**

**Bundesgerichtshof, December 9, 1958, BGHZ 29, 65**

Defendant cut an underground electric cable in the course of excavating the property of a third party which cut off the power to plaintiff's factory. The court held that the plaintiff could not recover. The court said that the right to run its enterprise without such interference was not a “similar right” (*sonstiges Recht*) with the meaning of BGB § 823 para. 1. Therefore “a claim for damages . . . for violation of a duty of care by the

defendant is not taken into consideration. A culpable omission to fulfill such a duty only gives rise to a claim for damages when the other party has been injured in the rights, and legal interests protected by BGB § 823 par. 1. Even if the defendant has violated a duty of care by which he was bound, which can be left aside, the plaintiff has not suffered harm to the legal interests and absolute rights protected by BGB 823 par. 1 but economic harm.”

### **Bundesgerichtshof, February 4, 1964, BGHZ 41, 123**

Defendants were felling trees along a public street. One of them fell against a power line owned by the *Rheinisch-Westfälischen Elektrizitätswerke*, cutting off the electricity to plaintiff's incubators for six hours. As a result, the 3,600 eggs that plaintiff was incubating produced only a few unsalable chickens instead of the 3,000 chickens which would otherwise have hatched.

The court held that the plaintiff could recover for the loss of the chickens. “It does not matter for the liability of the injurer whether the damage to property is immediate or the result of a ‘chain reaction’ and, as limited by the requirement of adequate causation, that is so also when a characteristic of a thing injured initially caused harm to other objects. One who is at fault for breaking a water pipe must answer for the harm that other property suffers from the escaping water. One has a similar liability if he injures a conduit and causes the escape of oil, gas or electric current. In this case, there would have been liability for damages for harm to property if the falling tree had broken the electric wires and brought them into contact with the plaintiff's property, thereby destroying it . . .

The peculiarity of the present case is due merely to the fact that the plaintiff's property was harmed by breaking off the electric current rather than misdirecting it. That cannot legally justify a difference in result. If, to preserve its substance, a thing needs a continual supply of water, electricity, or the like, then a person causes its destruction in the legal sense by cutting off this supply. Whoever culpably causes a breakdown of the irrigation apparatus of a garden or the heating of a hot house is therefore liable for the harm done to the plants, regardless of who is the owner . . .

It is otherwise when the failure of electricity does not cause the destruction of a thing but to the interruption of the accomplishment of certain results. In that event the case is one of pure economic loss (*reiner Vermögensschaden*).”

### **Chinese Law**

#### **Jinbo Corp. v. Yang Fan. (2016) 鄂08民终219号 (2016) E 08 Min Zhong No. 219**

Defendant Yang drove negligently on a wet and slippery road, skidded into a power line, and knocked it over. The power line was exclusively used by Jinbo Corp., a bottling factory. The accident caused a power outage at the factory for six hours. A month later, the power company cut the power

for two more hours to repair and replace the damaged power line. The bottling factory sued for property damage that included the loss of bottles in production at the time of the accident, the consumption of diesel fuel for the backup power, and economic loss for the hypothetical profit due to interruption of production.

The defendants argued that they shall not be liable for the loss as it is indirect. The only direct loss was the damage to the power transmission, which was covered by insurance. In addition, plaintiff's negligence contributed to the loss. The power line was only 50 cm away from the road and it was totally exposed, with neither protection nor warning signs. In addition, it should not have taken them eight hours to install a new transmission and fully repair the powerline. Had they anticipated the extent of the damage in the event of power outage, they should have sufficient backup power readily available.

The trial court, Shayang county court, allowed all three claims and awarded damage in the amount claimed, while the appellate court only supported the first two and denied the claim for pure economic loss. The appellate court found the bottling factory was not negligent. The bottling company did have backup power but the power generator needs substantial time to warm up. According to the accident report, if the generator were to start running immediately, it would likely cause an explosion of the generator. The court was of the view that the plaintiff had fulfilled its legal duty by having the generator and backup power in place. They could have been prepared and prevented the loss had the power outage been a scheduled one. The sudden blackout was unforeseeable, and the loss could not have been prevented.

Nevertheless, the appellate court, Jingmen intermediary court, held that tort law only extends protection to property rights rather than to economic loss. One might argue that the hypothetical loss of profit is also property loss but such loss did not arise from the loss of an actual asset of the company. Rather, it concerns future profit. Moreover, such a loss is not caused by loss of property – it is a negative property interest, which is pure economic loss outside the scope of property interests protected by tort law.

As such, the loss resulting from the damaged bottles was recoverable, so was the value of diesel fuel for the first six hours of power outage. The value of diesel fuel for the additional two hours of power outage for the repair cannot be recovered. The repair did not take place until one month after the accident. As such, causation between the repair and the accident could not be established.

#### **iv. Plaintiff's Property Made Unusable Law in the United States**

#### **People Express Airlines v. Consolidated Rail Corp., 495 A.2d 107 (N.J. 1985)**

"[T]he defendants' alleged negligence . . . caused a dangerous chemical to escape from a railway tank car, resulting in the evacuation from the surrounding area of persons whose safety and health were threatened. The



plaintiff, a commercial airline, was forced to evacuate its premises and suffered and interruption of its business with resultant economic loss . . .

The single characteristic that distinguishes parties in negligence suits whose claims for economic losses have been regularly denied by American and English courts from those who have recovered economic losses is, with respect to the successful claimants, the fortuitous occurrence of physical harm or property damage, however slight. It is well-accepted that a defendant who negligently injures a plaintiff or his property may be liable for all proximately caused harm, including economic losses. Nevertheless, a virtually per se rule barring recovery for economic loss unless the negligent conduct also caused physical harm has evolved throughout this century, based, in part, on *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927) and *Cattle v. Stockton Waterworks Co.*, 10 Q.B. 453 (1875). This has occurred although neither case created a rule absolutely disallowing recovery in such circumstances . . .

It is understandable that courts, fearing that if even one deserving plaintiff suffering purely economic loss were allowed to recover, all such plaintiffs could recover, have anchored their rulings to the physical harm requirement. While the rationale is understandable, it supports only a limitation on, not a denial of, liability. The physical harm requirement capriciously showers compensation along the path of physical destruction, regardless of the status or circumstances of individual claimants. Purely economic losses are borne by innocent victims who may not be able to absorb their losses. In the end, the challenge is to fashion a rule that limits liability but permits adjudication of meritorious claims. The asserted inability to fix crystalline formulae for recovery on the differing facts of future cases simply does not justify the wholesale rejection of recovery in all cases.”

### German Law

#### **Bundesgerichtshof, December 21, 1970, BGHZ 55, 153**

The defendant, the Federal Republic of Germany, is the owner of a canal, which connected a mill with a harbor. The canal became blocked for a considerable time due to defendant's failure to perform its duties of maintenance. The plaintiff was under contract to the mill. Because the canal was closed, plaintiff's ship, the *Christobel*, could not get out of the canal and remained moored by the mill. Moreover, three of plaintiff's barges that were outside the canal could not enter and reach the mill. The court allowed plaintiff to recover damages for the temporary loss of the ship but not damages suffered on account of the barges.

“The injury to property in a thing can result, not only from an impairment of its substance, but also through an impingement on the power of the owner. (Soergel/Zeuner, BGB, 10th ed. § 823 no. 24; see also BGB-RGRK, 11th ed., § 823 no. 15; Lorenz, *Lehrbuch des Schuldrechts* vol. 2, 9th ed. p. 407.) In the present case an injury to the property of the plaintiff in the *MS Christobel* occurred because the ship had to remain at the

loading dock of the mill because of the blocking of the canal. It therefore lost any possibility of moving beyond the point of the canal between the loading dock and the tree trunks blocking the canal. It therefore could not be put to its characteristic use as a means of transport . . .

In contrast, it is otherwise for the plaintiff's claim for damages for the barges on account of the canal being impassible. The defendant did not cause an injury to property because the blocking of the canal did not concern the barges as to the characteristic that they are means of transport and did not take away their normal use. This conclusion is not affected by the fact that the plaintiff could not sail the barges to the loading dock of the mill while the canal was blocked. That is not to be considered an encroachment on ownership but a hindering of the common use of the canal that belonged to all ships."

### Chinese Law

**Liu v. Liu and Tan et al.**, 刘军发与刘六妹侵权责任纠纷案 2017 粤0224民初615号 (2017) Yue 0224 Min Chu No. 615

Plaintiff contracted to cultivate a pig farm owned by Liu and Tan, two of the defendants. They had a dispute in 2014. As the dispute escalated, in March, 2016, three of the defendants whom the plaintiff did not know used a tractor to block the only public road leading up to the farm and further damaged the road so that the baby pigs could not be delivered. The plaintiff tried to repair the road and remove the tractor but the effort was interrupted by Tan and failed. The road was still damaged at the time of the trial. The production period for the farm is from March to August, and 1,238 baby pigs could not be delivered because of the road blockage. Plaintiff sued for economic loss of 152,026.40 yuan (122.80 yuan per pig times 1,238 pigs).

The defendants argued that the only loss they are liable for is the damage to the road. The economic loss was uncertain and without legal basis. Moreover, the damage could have been repaired by the plaintiff long ago.

Renhua county court held that the defendants' intentional conduct that damaged and blocked the road led to an objective pure economic loss to the plaintiff, for which the defendants are liable. Nevertheless, the plaintiff failed to remedy the situation. He did not begin to attempt to repair the road until two months after the incident. Also, despite the damage and blockage, it was not impossible to deliver the baby pigs. The distance between the damaged road and the farm was only 80 meters. Plaintiff could have mitigated the damage. Consequently, the plaintiff is also responsible for the loss. 20,000 yuan was awarded to the plaintiff.

### v. False Information

Consider whether the following cases are consistent with the previous ones, with each other, and with the principle that the plaintiff cannot recover for purely economic harm.

**English Law****Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd., [1964] AC 465 (H.L.)**

“A bank inquired by telephone of the respondent merchant bankers concerning the financial position of a customer for whom the respondents were bankers. The bank said that they wanted to know in confidence and without responsibility on the part of the respondents, the respectability and standing of E. Ltd., and whether E. Ltd. would be good for an advertising contract for £8,000 to £9,000. Some months later the bank wrote to the respondents asking in confidence the respondents’ opinion of the respectability and standing of E. Ltd. by stating whether the respondents considered E. Ltd. trustworthy, in the way of business, to the extent of £100,000 per annum. The respondents’ replies to the effect that E. Ltd. was respectably constituted and considered good for its normal business engagements were communicated to the bank’s customers, the appellants. Relying on these replies the appellants, who were advertising agents, placed orders for advertising time and space for E. Ltd., on which orders the appellants assumed personal responsibility for payment to the television and newspaper companies concerned. E. Ltd. went into liquidation and the appellants lost over £17,000 on the advertising contracts. The appellants sued the respondents for the amount of the loss, alleging that the respondents’ replies to the bank’s inquiries were given negligently, in the sense of misjudgment, by making a statement which gave a false impression as to E. Ltd.’s credit.”

Lord Reid. “Before coming to the main question of law it may be well to dispose of an argument that there was no sufficiently close relationship between these parties to give rise to any duty. It is said that the respondents did not know the precise purpose of the inquiries and did not even know whether National Provincial Bank, Ltd. wanted the information for its own use or for the use of a customer: they knew nothing of the appellants. I would reject that argument. They knew that the inquiry was in connexion with an advertising contract, and it was at least probable that the information was wanted by the advertising contractors. It seems to me quite immaterial that they did not know who these contractors were: there is no suggestion of any speciality which could have influenced them in deciding whether to give information or in what form to give it. I shall therefore treat this as if it were a case where a negligent misrepresentation is made directly to the person seeking information, opinion or advice, and I shall not attempt to decide what kind or degree of proximity is necessary before there can be a duty owed by the defendant to the plaintiff . . .

A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he

must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require . . .

[I]t must follow that *Candler v. Crane, Christmas & Co.*,<sup>1</sup> was wrongly decided. There the plaintiff wanted to see the accounts of a company before deciding to invest in it. The defendants were the company's accountants and they were told by the company to complete the company's accounts as soon as possible because they were to be shown to the plaintiff who was a potential investor in the company. At the company's request the defendants showed the completed accounts to the plaintiff, discussed them with him, and allowed him to take a copy. The accounts had been carelessly prepared and gave a wholly misleading picture. It was obvious to the defendants that the plaintiff was relying on their skill and judgment and on their having exercised that care which by contract they owed to the company, and I think that any reasonable man in the plaintiff's shoes would have relied on that. This seems to me to be a typical case of agreeing to assume a responsibility: they knew why the plaintiff wanted to see the accounts and why their employers, the company, wanted them to be shown to him, and agreed to show them to him without even a suggestion that he should not rely on them . . .

[B]efore leaving *Candler's* case, I must note that Cohen, L.J. (as he then was), attached considerable importance to a New York decision *Ultramares Corporation v. Touche*,<sup>2</sup> a decision of Cardozo, C.J. But I think that another decision of that great judge, *Glanzer v. Shepard*,<sup>3</sup> is more in point because in the latter case there was a direct relationship between the weigher who gave a certificate and the purchaser of the goods weighed, who the weigher knew was relying on his certificate: there the weigher was held to owe a duty to the purchaser with whom he had no contract . . .

Here, however, the appellants' bank, who were their agents in making the enquiry, began by saying that 'they wanted to know in confidence and without responsibility on our part', i.e. on the part of the respondents. So I cannot see how the appellants can now be entitled to disregard that and maintain that the respondents did incur a responsibility to them."

### Law in the United States

#### **Ultramares Corporation v. Touche, 174 N.E. 441 (N.Y. 1934)**

Defendants were a firm of public accountants hired to prepare and certify the balance sheet of Fred Stern & Co. They knew the balance sheet would be shown to banks, creditors, stockholders, purchasers and sellers. They did not know it would be shown to the plaintiff in particular. Through defendants' negligence, the balance sheet showed Fred Stern & Co. to have a net worth of over \$1,000,000. In fact, it was insolvent. The plaintiff sued for money it lost by dealing with Fred Stern & Co. in reliance on the balance sheet. The court denied recovery.

1. [1951] 1 All E.R. 426; [1951] 2 K.B. 164.

2. (1931), 255 N.Y. 170.

3. (1922), 233 N.Y. 236.

Cardozo J. "The defendants owed to their employer a duty imposed by law to make their certificate without fraud, and a duty growing out of contract to make it with the care and caution proper to their calling. Fraud includes the pretense of knowledge when knowledge there is none. To creditors and investors to whom the employer exhibited the certificate, the defendants owed a like duty to make it without fraud, since there was notice in the circumstances of its making that the employer did not intend to keep it to himself. A different question develops when we ask whether they owed a duty to these to make it without negligence. If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences."

**Glanzer v. Shepard, 233 N.Y. 236 (1922)**

Defendants, who were engaged in business as public weighers, were requested by sellers of beans to weigh them and certify the weight. The beans were accepted and paid for on the faith of the certificates. Plaintiffs then found that the actual weight was less than the weight certified in the return, and sued defendants for the amount they overpaid. The court held defendants liable.

Cardozo J. "The plaintiffs' use of the certificates was not an indirect or collateral consequence of the action of the weighers. It was a consequence which, to the weighers' knowledge, was the end and aim of the transaction . . . The defendants held themselves out to the public as skilled and careful in their calling. They knew that the beans had been sold, and that on the faith of their certificate payment would be made. They sent a copy to the plaintiffs for the very purpose of inducing action. All this they admit. In such circumstances, assumption of the task of weighing was the assumption of a duty to weigh carefully for the benefit of all whose conduct was to be governed. We do not need to state the duty in terms of contract or of privity. Growing out of a contract, it has none the less an origin not exclusively contractual. Given the contract and the relation, the duty is imposed by law."

**White v. Guarente, 372 N.E. 315 (N.Y. 1977)**

Defendants did the accounting for a limited partnership. In a limited partnership, the limited partners contribute capital and have limited liability: that is, the amount they can lose is limited to the amount they have invested. The general partners manage the partnership and have liability that is not limited: creditors can go after their personal assets if those of the partnership are insufficient. In this case, defendants were alleged to have been negligent in failing to discover that the general partners had withdrawn their own funds from the partnership in violation of the partnership agreement. The court held that, if so, they were liable to

the limited partners: “*Ultramares* ... presented a noticeably different picture than that here, since there involved was an ‘indeterminate class of persons who, presently or in the future, might deal with the [firm] in reliance on the audit’ ...

Here, the services of the accountant were not tied to a faceless or unresolved class of persons, but rather to a known group possessed of vested rights, marked by a definable limit and made up of certain components. The instant situation did not involve prospective limited partners unknown at the time and who might be induced to join, but rather actual limited partners, fixed and determined. Here, accountant Andersen was retained to perform an audit and prepare the tax returns of Associates, known to be a limited partnership, and the accountant must have been aware that a limited partner would necessarily rely on or make use of the audit and tax returns of the partnership, or at least constituents of them, in order to properly prepare his or her own tax returns. This was within the contemplation of the parties to the accounting retainer. In such circumstances, assumption of the task of auditing and preparing the returns was the assumption of a duty to audit and prepare carefully for the benefit of those in the fixed, definable and contemplated group whose conduct was to be governed, since, given the contract and the relation, the duty is imposed by law and it is not necessary to state the duty in terms of contract or privity.”

**Credit Alliance Corp. v. Andersen & Co., 483 N.E.2d 110 (N.Y. 1985)**

The court decided two companion cases. In both, lenders sought to hold accountants liable for negligence in preparing financial statements on which they had relied. In the first case (*Credit Alliance*) the court dismissed the action because, although Smith, the lender, had relied on the statement, the accountants had not been “employed to prepare the reports with the Smith loan in mind.” In the second (*European American Bank & Trust v. Strauhs & Kaye*), the court permitted the action because the accounting firm “was well aware that a primary if not the exclusive, end and aim of auditing its client, Majestic Electro, was to provide EAB [the lender] with the financial information it required.”

**German Law**

**Oberlandesgericht, Munich, July 13, 1956, BB 1956, 866**

An enterprise had the defendants, a credit report company, prepare a statement of its financial worth so that, as the defendant knew, it could obtain a loan from the plaintiff, a bank. The bank granted the loan and cannot now recover it from the borrower. The statement was false as to some essential points and gave an overly favorable picture of the borrower. The bank recovered from the defendant.

“In the eyes of an outsider and therefore of the bank, from the time it was given, the financial statement must have been a piece of information whose correctness was guaranteed by the corporate entity that was the



credit information company. This peculiarity makes that information binding in the sense that in giving the information it must have understood that as a matter of good faith, it was assuming liability for its correctness to the bank; for no party could have taken the view that the credit report company prepared the information only as the exclusive representative of the interests of the party who commissioned the report. In such a case, the question is not whether the party receiving and giving information were then bound by a contract. It is also irrelevant whether the parties giving and receiving information intended to establish contractual relations. It is enough that the party giving information to the one receiving it has, by preparing and sending the information, entered into a relationship that ought to be regarded as contractual as a matter of good faith and therefore should be determined to be contractual. Here, the existence of a contractual relationship between the bank and the credit report company is beyond doubt because that company sent the report directly to the bank. But even if it had given it to the person who commissioned it, that would not lead to a basic doubt about the existence of a contractual relation between the bank and the credit report company."

**Bundesgerichtshof, February 12, 1979, NJW 1979, 1595**

U., a third party, built a hotel, Hotel P., financed by a 2.5 million DM loan from defendant bank. It decided to raise a further 3.5 million DM from private investors. The defendants prepared a description of the deal that was to be proposed to these investors. The description mentioned that the hotel had been opened in the presence of many dignitaries; that it had already made long-term arrangements with several international travel agencies; that it was owned by U. "whom we know as a client and a competent businessman"; that U. also owned a hotel in Teneriffe and two sanatoria; and that U. needed to raise the loan; and that U.'s "liquidity position is strained." The court found that this statement gave a false impression. It did not mention that the hotel and sanatoria had not been paid for, and that U. was no longer in a position to pay their bills. The court held defendant liable.

"All of the factual presuppositions are present for the defendant to be liable in damages for culpably preparing false information. According to established case law, when information is supplied by a bank, contract or contract-like relations exist between the information seeker and the credit institution when the information the bank supplies is known to be important to the other party and to be the basis of substantial measures with regard to its assets. (See Senat, NJW 1970, 1737 = AGB der Banken 10 no. 4.) The state of affairs in this case is not essentially different. Here the bank addressed a quite clearly defined group of interested persons, namely, the private lenders who were interested in granting a loan for the project Hotel P. The information was directed at this group which defendant had an interest in attracting and which he knew would be making substantial financial decisions on the basis of this information. This was its aim. It cannot legally make a difference whether the party

seeking information turned to the bank or it went to them. In view of the purpose of the information the bank must recognize that those who receive the information will understand it as a legally binding declaration.”

## 5. Harm Suffered Because Another Is Harmed

### Traditional Anglo-American Law

#### *Note on Actions for Loss of Consortium and Wrongful Death.*

Traditionally, to recover in tort the plaintiff himself had to be struck, his land invaded, and so forth, depending on the form of action. A traditional English exception was that a husband could recover for loss of his wife's services, and a parent for loss of a child's services, apparently because the plaintiff was thought to have a sort of proprietary interest in receiving them.<sup>1</sup> This was called an action for loss of “consortium.” One traditional limitation on the action was that the action could not be brought if the wife or child died – only if she or he was injured. *Baker v. Bolton*, (1804) 170 E.R. 1033 (K.B., Lord Ellenborough). Another limitation was that only the husband or parent could recover. In 1952, the House of Lords refused to allow a wife to recover for loss of her husband's consortium. The action for loss of consortium came to be regarded as archaic and anomalous. It was abolished in England by the Administration of Justice Act 1982 s. 2.

The action survives in the United States. Since 1950, American courts have allowed a wife whose husband is injured to recover for “loss of consortium.” *Hitaffer v. Argonne*, 183 F.2d 811 (1950). All American jurisdictions now agree. Loss of consortium includes the “loss of the society and services of the first spouse, including impairment of the capacity for sexual intercourse, and for reasonable expense incurred by the second spouse in providing medical treatment.” Restatement (Second) of Torts § 693(1). American courts today are split on whether a child whose parent has been injured can recover for loss of consortium: e.g. *Borer v. American Airlines*, 563 P.2d 858 (Cal. 1977) (Tobriner, J.) (child cannot recover); *Berger v. Weber*, 303 N.W.2d 424 (Mich. 1981) (child can recover). By the end of the twentieth century, sixteen jurisdictions had recognized the child's right to recover.<sup>2</sup> A few courts have held that parents can recover for the loss of companionship of an adult child, even one who is not supporting them. *Howard Frank, M.D. P.C. v. Superior Court*, 722 P.2d 955 (Ariz. 1986) (severe brain damage). Siblings and step-parents have been denied recovery. *Ford Motor Co. v. Miles*, 967 S.W.2d 377 (Tex. 1998). One California court allowed an unmarried cohabitant to recover for loss of consortium. *Butcher v. Superior Court*, 188 Cal.

1. John G. Fleming, *The Law of Torts* (8th edn., 1993), 180.

2. Dan B. Dobbs, Paul T. Hayden, and Ellen M. Bublick, *Hornbook on Torts* (2nd edn., 2016), 719, n. 157.

Rptr. 503 (Cal. App. 1983). But that result was rejected in *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988).

The other traditional limitation on an action for loss of consortium was that the husband or parent could not recover after the wife or child had died. This limitation was overcome by enacting statutes. In England, an action for wrongful death was created by Lord Campbell's Act of 1846. Fatal Accidents Act, 9 & 10 Vict. c. 93. In its current amended form, the action gives a claim for pecuniary damages to a limited class of persons, and a claim for "bereavement" to a still more sharply limited group. Pecuniary damages can be recovered by a spouse, former spouse, or person who "was living . . . as the husband or wife of the deceased" in his or her household for two years prior to the date of death. Pecuniary damages can also be recovered by those who are or were treated by the deceased as parents or other ascendants, or children or other descendants. They can also be recovered by a brother, sister, uncle or aunt of the deceased plus their "issue." Fatal Accidents Act 1976 s. 1(3). In contrast, claims for bereavement can be brought only by the spouse of the deceased or by the parents of a minor who never married. These people can recover only a fixed amount which is currently £7,500.

The question we will be asking in this next section is when, aside from the actions just mentioned, can one person recover for grief or shock over an injury to another.

**Note on Liability for Intentional Conduct.** On English law, read *Wilkinson v. Downton*, pp. 317–318 above. On American law, read Restatement (Second) of Torts § 46, p. 320 above. In the United States, the English case of *Wilkinson v. Downton* is usually thought of as an instance of this new tort described in Restatement (Second) of Torts § 46, sometimes called "intentional infliction of emotional distress." Before this new tort was recognized, courts sometimes gave relief without explaining the grounds for doing so. Consider the following cases.

**Hill v. Kimball, 13 S.W. 59 (Tex. 1890)**

Defendant entered plaintiff's land and severely beat two laborers in her presence, knowing she was pregnant. She suffered a miscarriage. She recovered although it is not clear for what tort.

**Lambert v. Brewster, 125 S.E. 244 (W. Va. 1924)**

Defendant struck plaintiff's father in her presence. She suffered a miscarriage. She recovered although it is not clear for what tort.

**Note on Liability for Negligent Conduct.** England adopted a so-called "zone of danger" rule in *Dulieu v. White & Sons*, [1901] 2 K.B. 669. The plaintiff who becomes ill due to shock can recover as long as he was exposed to the danger of being injured physically. There, the plaintiff recovered when the defendant's servant drove a van into the public house

where the plaintiff was seated behind the bar.<sup>3</sup> Under this rule, the plaintiff could recover for shock at seeing another person injured but only if the plaintiff might have been physically injured himself. Some American courts adopted such a “zone of danger” test, and it passed into the first Restatement of Torts § 313(2).

Today, English law, and the law of many American jurisdictions, take a more liberal approach. We will look first at the rule adopted in California in *Dillon v. Legg*, and then at the English rule, which goes a step beyond it.

### Modern Law in the United States

#### **Dillon v. Legg, 441 P.2d 912 (Cal. 1968)**

A child was struck and killed by an automobile in the presence of his mother and minor sister. The mother was outside of the zone of danger; the sister may have been within it. Tobriner, J., speaking for the court, rejected the zone of danger rule and allowed both to recover. He said:

“Normally the simple facts of plaintiff’s complaint would establish a cause of action: the complaint alleges that defendant drove his car (1) negligently, as a (2) proximate result of which plaintiff suffered (3) physical injury. Proof of these facts to a jury leads to recovery in damages; indeed, such a showing represents a classic example of the type of accident with which the law of negligence has been designed to deal. The assertion that liability must nevertheless be denied because defendant bears no ‘duty’ to plaintiff begs the essential question – whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct . . .

Since the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case. Because it is inherently intertwined with foreseeability such duty or obligation must necessarily be adjudicated only upon a case-by-case basis. We cannot now predetermine defendant’s obligation in every situation by a fixed category; no immutable rule can establish the extent of that obligation for every circumstance of the future. We can, however, define guidelines which will aid in the resolution of such an issue as the instant one.

We note, first, that we deal here with a case in which plaintiff suffered a shock which resulted in physical injury and we confine our ruling to that case. In determining, in such a case, whether defendant should reasonably foresee the injury to plaintiff, or, in other terminology, whether defendant owes plaintiff a duty of due care, the courts will take into account such factors as the following: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2)

3. The House of Lords affirmed this rule in *Page v. Smith* [1996] 1 A.C. 211, where the plaintiff had suffered nervous shock, though he was not injured physically, because of a minor collision between his vehicle and the defendant’s. The court said: “Since the

defendant was admittedly under a duty of care not to cause plaintiff foreseeably physical injury, it was unnecessary to ask whether he was under a separate duty of care not to cause foreseeable psychiatric injury.”

Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

The evaluation of these factors indicate the degree of the defendant's foreseeability: obviously defendant is more likely to foresee that a mother who observes an accident affecting her child will suffer harm than to foretell that a stranger witness will do so. Similarly, the degree of foreseeability of the third person's injury is far greater in the case of his contemporaneous observance of the accident than that in which he subsequently learns of it. The defendant is more likely to foresee that shock to the nearby, witnessing mother will cause physical harm than to anticipate that someone distant from the accident will suffer more than a temporary emotional reaction. All these elements, of course, shade into each other; the fixing of obligation, intimately tied into the facts, depends upon each case.

In light of these factors the court will determine whether the accident and harm was reasonably foreseeable. Such reasonable foreseeability does not turn on whether the particular defendant as an individual would have in actuality foreseen the exact accident and loss; it contemplates that courts, on a case-to-case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen. The courts thus mark out the areas of liability, excluding the remote and unexpected."

**Dan B. Dobbs, Paul T. Hayden, and Ellen M. Bublick, *Hornbook on Torts* (2nd edn., 2016), 716–17 (citations omitted)**

"A guidelines approach to foreseeable emotional distress does not necessarily require the plaintiff to witness the initial injury, but it is not enough that she simply hear about it later. Courts usually agree that the plaintiff must see the injured person before the victim's condition has substantially changed . . . Some authority is a little more liberal; Alaska upheld the right of a mother to recover when she rushed to the scene of the accident but saw her injured daughter only later at the hospital. Some cases have insisted that the plaintiff must not only see the victim's suffering or death, but that the event they witness is sudden and traumatic. So families who watch a child's prolonged suffering and death because of a druggist's misfiled prescription or a doctor's misdiagnosis simply have no claim for bystander emotional distress.

Although many relationships may be close, courts have tended to restrict the close relationship category. Many cases have denied recovery to strangers who engage in heroic and distressing rescue attempts. Similarly, non-family participants who, because of the defendant's negligence, innocently trigger horrifying harms to the victim have also been denied recovery, although English courts may grant recovery on such claims. Even a fiancé[e] who witnessed the death of the man she was

engaged to marry was denied recovery. And a noncustodial parent, an aunt who raised the child – have seen recovery denied . . .

Not all courts are so restrictive, however. Some fiancés and unmarried cohabitants living together as domestic partners may qualify as close family . . . Some courts take a flexible approach to determining which relationships are especially close. New Hampshire considers factors like the duration of the relationship, the extent and quality of shared experience, and others.”

### Modern English Law

#### McLoughlin v. O'Brian, [1983] A.C. 410

“The plaintiff’s husband and four children were involved in a road accident at about 4 p.m. on October 19, 1973, when their car was in collision with a lorry driven by the first defendant and owned by the second defendants that had itself just collided with an articulated lorry driven by the third defendant and owned by the fourth defendants. The plaintiff, who was at home two miles away at the time, was told of the accident at about 6 p.m. by a neighbour, who took her to hospital to see her family. There she learned that her youngest daughter had been killed and saw her husband and the other children and witnessed the nature and extent of their injuries. She alleged that the impact of what she heard and saw caused her severe shock resulting in psychiatric illness.

Lord Wilberforce. “Although in the only case which has reached this House (*Bourhill v. Young* [1943] A.C. 92) a claim for damages in respect of ‘nervous shock’ was rejected on its facts, the House gave clear recognition to the legitimacy, in principle, of claims of that character. As the result of that and other cases, assuming that they are accepted as correct, the following position has been reached:

1. While damages cannot, at common law, be awarded for grief and sorrow, a claim for damages for ‘nervous shock’ caused by negligence can be made without the necessity of showing direct impact or fear of immediate personal injuries for oneself. The reservation made by Kennedy J. in *Dulieu v. White & Sons* [1901] 2 K.B. 669, though taken up by Sargant. L.J. in *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141, has not gained acceptance, and although the respondents, in the courts below, reserved their right to revive it, they did not do so in argument. I think that it is now too late to do so. The arguments on this issue were fully and admirably stated by the Supreme Court of California in *Dillon v. Legg* (1968) 29 A.L.R. 3d 1316.
2. A plaintiff may recover damages for ‘nervous shock’ brought on by injury caused not to him- or herself but to a near relative, or by the fear of such injury. So far (subject to 5 below), the cases do not extend beyond the spouse or children of the plaintiff (*Hambrook v. Stokes Brothers* [1925] 1 K.B. 141, *Boardman v. Sanderson* [1964] 1 W.L.R. 1317, *Hinz v. Berry* [1970] 2 Q.B. 40 – including foster



- children – (where liability was assumed) and see *King v. Phillips* [1953] 1 Q.B. 429).
3. Subject to the next paragraph, there is no English case in which a plaintiff has been able to recover nervous shock damages where the injury to the near relative occurred out of sight and earshot of the plaintiff. In *Hambrook v. Stokes Brothers* an express distinction was made between shock caused by what the mother saw with her own eyes and what she might have been told by bystanders, liability being excluded in the latter case.
  4. An exception from, or I would prefer to call it an extension of, the latter case, has been made where the plaintiff does not see or hear the incident but comes upon its immediate aftermath. In *Boardman v. Sanderson* the father was within earshot of the accident to his child and likely to come upon the scene: he did so and suffered damage from what he then saw. In *Marshall v. Lionel Enterprises Inc.* [1972] 2 O.R. 177, the wife came immediately upon the badly injured body of her husband. And in *Benson v. Lee* [1972] V.R. 879, a situation existed with some similarity to the present case. The mother was in her home 100 yards away, and, on communication by a third party, ran out to the scene of the accident and there suffered shock. Your Lordships have to decide whether or not to validate these extensions.
  5. A remedy on account of nervous shock has been given to a man who came upon a serious accident involving numerous people immediately thereafter and acted as a rescuer of those involved (*Chadwick v. British Railways Board* [1967] 1 W.L.R. 912). 'Shock' was caused neither by fear for himself nor by fear or horror on account of a near relative. The principle of 'rescuer' cases was not challenged by the respondents and ought, in my opinion, to be accepted. But we have to consider whether, and how far, it can be applied to such cases as the present.

Throughout these developments, as can be seen, the courts have proceeded in the traditional manner of the common law from case to case, upon a basis of logical necessity. If a mother, with or without accompanying children, could recover on account of fear for herself, how can she be denied recovery on account of fear for her accompanying children? If a father could recover had he seen his child run over by a backing car, how can he be denied recovery if he is in the immediate vicinity and runs to the child's assistance? If a wife and mother could recover if she had witnessed a serious accident to her husband and children, does she fail because she was a short distance away and immediately rushes to the scene (cf. *Benson v. Lee*)? I think that unless the law is to draw an arbitrary line at the point of direct sight and sound, these arguments require acceptance of the extension mentioned above under 4 in the interests of justice.

If one continues to follow the process of logical progression, it is hard to see why the present plaintiff also should not succeed. She was not present at the accident, but she came very soon after upon its aftermath. If, from a distance of some 100 yards (cf. *Benson v. Lee*), she had found her family by

the roadside, she would have come within principle 4 above. Can it make any difference that she comes upon them in an ambulance, or, as here in a nearby hospital, when, as the evidence shows, they were in the same condition, covered with oil and mud, and distraught with pain? ...

As regards proximity to the accident, it is obvious that this must be close in both time and space. It is, after all, the fact and consequence of the defendant's negligence that must be proved to have caused the 'nervous shock.' Experience has shown that to insist on direct and immediate sight or hearing would be impractical and unjust and that under what may be called the 'aftermath' doctrine one who, from close proximity, comes very soon upon the scene should not be excluded ...

Finally, and by way of reinforcement of 'aftermath' cases, I would accept, by analogy with 'rescue' situations, that a person of whom it could be said that one could expect nothing else than that he or she would come immediately to the scene – normally a parent or a spouse – could be regarded as being within the scope of foresight and duty. Where there is not immediate presence, account must be taken of the possibility of alterations in the circumstances, for which the defendant should not be responsible.

Subject only to those qualifications, I think that a strict test of proximity by sight or hearing should be applied by the courts.

Lastly, as regards communication, there is no case in which the law has compensated shock brought about by communication by a third party. In *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141, indeed, it was said that liability would not arise in such a case and this is surely right. It was so decided in *Abramzik v. Brenner* (1967) 65 D.L.R. (2d) 651. The shock must come through sight or hearing of the event or of its immediate aftermath. Whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice may have to be considered."

### **Alcock v. Chief Constable of South Yorkshire Police, [1992] 1 AC 310**

Shortly before the commencement of a major football match at a football stadium the police responsible for crowd control at the match allowed an excessively large number of intending spectators into a section of the ground which was already full, with the result that ninety-five spectators were crushed to death and over 400 injured. Scenes from the ground were broadcast live on television from time to time during the course of the disaster and were broadcast later on television as news items. News of the disaster was also broadcast over the radio. However, in accordance with television broadcasting guidelines none of the television broadcasts depicted suffering or dying of recognizable individuals.

Lord Keith of Kinkel. "I would not seek to limit the class by reference to particular relationships such as husband and wife or parent and child. The kinds of relationship which may involve close ties of love and affection are numerous, and it is the existence of such ties which leads to mental disturbance when the loved one suffers a catastrophe. They may be present

in family relationships or those of close friendship, and may be stronger in the case of engaged couples than in that of persons who have been married to each other for many years. It is common knowledge that such ties exist, and reasonably foreseeable that those bound by them may in certain circumstances be at real risk of psychiatric illness if the loved one is injured or put in peril. The closeness of the tie would, however, require to be proved by a plaintiff, though no doubt being capable of being presumed in appropriate cases. The case of a bystander unconnected with the victims of an accident is difficult. Psychiatric injury to him would not ordinarily, in my view, be within the range of reasonable foreseeability, but could not perhaps be entirely excluded from it if the circumstances of a catastrophe occurring very close to him were particularly horrific . . .

Of the present appellants two, Brian Harrison and Robert Alcock, were present at the Hillsborough ground, both of them in the West Stand, from which they witnessed the scenes in pens 3 and 4. Brian Harrison lost two brothers, while Robert Alcock lost a brother-in-law and identified the body at the mortuary at midnight. In neither of these cases was there any evidence of particularly close ties of love or affection with the brothers or brother-in-law. In my opinion the mere fact of the particular relationship was insufficient to place the plaintiff within the class of persons to whom a duty of care could be owed by the defendant as being foreseeably at risk of psychiatric illness by reason of injury or peril to the individuals concerned. The same is true of other plaintiffs who were not present at the ground and who lost brothers, in one case a grandson. I would, however, place in the category of members to which risk of psychiatric illness was reasonably foreseeable Mr and Mrs Copoc, whose son was killed, and Alexandra Penk, who lost her fiancé. In each of these cases the closest ties of love and affection fall to be presumed from the fact of the particular relationship, and there is no suggestion of anything which might tend to rebut that presumption. These three all watched scenes from Hillsborough on television, but none of these depicted suffering of recognisable individuals, such being excluded by the broadcasting code of ethics, a position known to the defendant. In my opinion the viewing of these scenes cannot be equated with the viewer being within 'sight or hearing of the event or of its immediate aftermath', to use the words of Lord Wilberforce in *McLoughlin v. O'Brian* [1982] 2 All ER 298 at 305 [1983] 1 AC 410 at 423. . . ."

### French Law

The French Civil Code in Articles 1240–1 merely speaks of "harm" (*dommage*). One sort of harm recognized by French law is "harm by ricochet" (*dommage par ricochet*). This sort of harm occurs when an injury to one person causes harm to another. Thus when one spouse is killed or disabled, the other spouse or a child can sue for loss of support under Articles 1382–3. In principle, however, such a claim does not need to be made by a near relative or even a relative. Someone who was living with the injured person or having an affair with him can recover. When, exactly,

is not clear. In allowing such an action, the *Chambre mixte* of the *Cour de cassation* insisted that the relationship had to be stable and that it could not be adulterous. Decision of Feb. 27, 1970, D. 1970.201. When suit was brought by two women over the death of a man who preferred to eat at home with one of them and spend the night with the other, recovery was denied them both on the grounds that such a relationship must have been unstable. Cour de cassation, ch. crim., Jan. 8, 1985, Gaz. Pal. 1985.2.480. Moreover, the Criminal Chamber of the *Cour de cassation* has allowed recovery even if the relationship is adulterous. Cour de cassation, ch. crim., May 3, 1977, Bull. crim. 1977.3.374. Accordingly, a lower court allowed two women to recover when a man died who was married to one of them. Cour d'appel, Riom, Nov. 9, 1978, JCP 79.II.19107.

The question examined in the following cases is when one can recover for grief or shock.

**François Terré, Philippe Simler, Yves Lequette, and François Chénéde, *Droit civil Les obligations* (12th edn., 2019), 1024**

“It is particularly in relation to suffering by reason of the death of a dear one or even the physical suffering he underwent that one may ask if the case law has not been too rigid in indemnifying the harm due to affection. In effect, after having adopted a liberal solution in generous terms, it has chosen, on the one hand, to subordinate indemnification for the harm due to affection to the existence of a bond of parenthood or marriage and, on the other hand, not to allow it except in cases of the victim’s immediate death or, at least, to cases in which those near him suffered exceptionally severe harm. But these restrictions have been abandoned.”

**Cour de cassation, 2<sup>e</sup> ch. civ., February 16, 1967, Bull. civ. 1967.II. no. 77**

A child injured by the defendant was in danger of death for two weeks and remained 15 percent permanently disabled on account of headaches, difficulty sleeping, and “a little instability.” The *Cour d’appel* denied his parents compensation for their own suffering. The *Cour de cassation* upheld that decision on the grounds that the harm to the child did not have the “exceptional character” that would allow the parents to recover.

**Cour de cassation, 2<sup>e</sup> ch. civ., May 23, 1977, Bull. civ. II, no. 139, p. 96**

A son whose father had been totally incapacitated in an accident caused by the defendant sought recovery for the suffering he experienced seeing his father in such a state. The *Cour d’appel* rejected his claim on the ground that the harm was not of “exceptional gravity.” Although totally incapacitated, the father was not bed-ridden and could give his son advice and show him affection. The *Cour de cassation* overturned that decision on the ground that “the only proof required is of personal harm suffered by the son that is certain and direct.” Article 1382 “applies as much to non-physical harm (*damage morale*) as to physical harm (*dommage matériel*).”

In a note on this decision, Durry remarked: "One could not more clearly abandon the earlier position according to which harm to those near the victim was compensable only if it was of exceptional gravity, precisely the position on which the judges below had expected to avoid censure.

*De lege lata*, we can only approve this reaffirmation of the rule contained in the decision of 8 December 1971 which also seemed to us to be appropriate (this *Revue* 1974.601). Once one admits compensation for non-physical harm (*dommage morale*), one cannot see in the name of what legal argument one can reject the claim of those close to a surviving victim who can prove the pain that the state of this victim has caused them. Indeed, in addition one must be exacting as to this proof in order to avoid cascades of mythical claims. But to us personally it does not appear scandalous that a son claims to have suffered at the spectacle of his father disabled one hundred percent." G. Durry, RTDC 1977, 768 at 769.

**Cour de cassation, 2<sup>e</sup> ch. civ., January 20, 1967, 1967 Bull. civ. II, no. 30**

The *Cour d'appel* allowed a ward to recover for his suffering at the death of a guardian for whose death the defendant was responsible. The guardian was the father of the child's mother and raised him from the age of two months. The *Cour de cassation* upheld this decision.

In a note on these two cases, Durry said: "The second civil chamber as one knows has had reservations about actions to recover for non-physical harm (*préjudice morale*) brought by other persons than the initial victim of an accident. If the victim has survived, the *Cour de cassation* is especially reticent: it will only allow the action if the other party – in practice, the father or the mother – suffered non-physical harm of an exceptional nature. (Cass. civ. 22 Oct. 1946, JCP 1946.3.365, D. 1947, 59; Cass., 2d civ. ch., 15 Feb. 1956, D. 1956.350 ...). In contrast, if the victim is deceased, the second civil chamber is less strict, while requiring, in conformity with the case law that began with a well-known decision of 2 February 1931 of the *Chambre des requêtes* [of the *Cour de cassation*] a bond of kinship or marriage between the victim of the injury and those who wish compensation for non-physical harm caused by his decease ..."

As to the decision of February 16, 1967, refusing to allow recovery when the child was disabled: "If one admits the principle espoused by the court because it prevents too many claims, nevertheless, its application to this case seems overly hard. To our mind, it is not only a question of 15% permanent disability but of the danger of death which this child ran for fifteen days. If that is not a non-physical harm of exception of gravity for the parents, then these words do not have much meaning! No doubt, normally the parents will deem themselves only too happy that their child has escaped death and will not claim any compensation on this account. But if they do, on what ground can they be refused compensation? Or, indeed, should the very principle of recovery for non-physical harm be

reconsidered (Cf. Ripert, *Le prix de douleur*, Chron. D. 1948.1), but that does not seem to be the position adopted by the case law.”

As to the decision of January 20, 1967 allowing the ward to recover: “It is true that the case is one of the most favorable for recovery, the guardian having raised the child from the age of two months and being the father of the child’s mother . . . Evidently, given the very special character of the case, one cannot conclude that the second civil chamber has abandoned its earlier restrictive position. But it remains true that this decision is incompatible with that position . . . and that it can be considered a breach . . . in a bastion that can see no decisive reason for not dismantling entirely. If pain is real, there ought to be recovery.” G. Durry, *Rev. trim. dr. civ.* 1967, 815 at 815–16.

**Cour de cassation, 1<sup>e</sup> ch. civ., January 16, 1962, JCP 1962.II.12557**

The plaintiff’s race horse was accidentally electrocuted while in a stall provided by the defendant, *Société Hippique de Langdon*, on whose premises the horse had been brought for a race. Plaintiff sought recovery, not merely for the value of the horse, but for sorrow suffered at its death. Such damages were granted by the *Cour d’appel*, and the award was upheld by the *Cour de cassation*: “Independently of the material harm that it entails, the death of an animal can also cause harm to its owner that is subjective and to the feelings (*effectif*) which is subject to compensation; . . . in this case the *Cour d’appel* was able to determine that the harm suffered . . . was not limited to the sum necessary to buy another animal possessing the same qualities . . . it was equally appropriate in computing damages to include a sum to compensate for the harm caused by the loss of an animal to which he was attached.”

**Cour de cassation, ch. crim., March 1, 1973, JCP 1974.II.17615**

Under French law, those who have been injured by the commission of a crime can be awarded compensation in the criminal proceeding brought against the defendant. Here, the wife and brother of a man killed by the defendant in a traffic accident sought damages for a psychological injury they had suffered as a result: depression. They asked the *Cour de cassation* to overturn a refusal by the appellate court to order that expert evidence be taken concerning this injury. The *Cour de Cassation* refused to do so. “[T]he *Cour d’appel* stated that if the commission of an involuntary homicide directly caused an injury to the feelings (*préjudice d’affection*) to those close to the victim, nevertheless the physical harms that the decease of the victim by repercussion on these near ones do not flow directly from the infraction and cannot be made the object of a demand for compensation . . . .”

Professor Viney, in her note on this case, said that the decision might be due to a desire to restrict liability “in response to a certain excess in the awarding of damages, notably for the sorrow experienced by the death or wounds inflicted on an animal . . . .” She concluded: “If we should think that such was the intention of the magistrates of the supreme court, we would not



hesitate to criticize it. It would be singularly inequitable to refuse compensation for sorrow precisely at the moment when it goes beyond the threshold the psyche of the victim can bear, although compensation may always be obtained for 'reasonable' unhappiness. Moreover, on a juridical level, one may remark that when sorrow takes the form of physical troubles, granting compensation is not open to any of the objections traditionally addressed to compensation for non-physical harm (*dommage morale*): proof can be made by medical expertise, and while its evaluation is not easy, it does not entail greater difficulties than those of evaluating physical harm."

### German Law

**Note on Actions for Loss of Support.** Section 844(2) of the German Civil Code allows a plaintiff to recover for loss of support which the person killed was legally obligated to provide. The action only arises when the deceased person could have recovered against the defendant. The people who are under such a duty to provide support are identified in §§ 1360, 1570, 1601, 1615, 1736, 1739, 1754, and 1755. Section 845 allows a plaintiff to recover for loss of services which the person killed was legally obligated to perform. Again, the cases that follow deal with recovery for grief or shock at the death of another person.

### Landgericht, Frankfurt am Main, March 28, 1969, NJW 1969, 2286

The defendant was a drunk driver who negligently drove onto the sidewalk and killed the plaintiff's companion, a member of the United States Air Force, who was walking with her hand in hand. She suffered minor physical injuries and a severe nervous shock for which she was treated for two months in a university nerve clinic. Thereafter, she remained nervous and fearful in traffic, she was often sleepless; she suffered nervous symptoms such as neck and back pains, and at the memory of the accident, she would break helplessly into tears. The court allowed her recovery for the shock and its after effects. She claimed that she and her companion had been engaged and planned to marry soon. The defendant denied that they were engaged.

"The shock of the accident . . . is to be considered an injury to health within the meaning of BGB § 823 par. 1 . . . That the psychic injury suffered by the plaintiff did not lead to organic harm does not contradict the conclusion that an injury to health occurred. Insofar as occasional divergent views appear in the case law (see, most recently, Landgericht Krefeld, VersR 69, 166), they fail to understand that limiting the concept of an injury to health to organic injury is irreconcilable with the modern scientific understanding of the nature of disease, and accordingly with the concept of an injury to health . . .

It is true that the case law has previously recognized only an injury through the death of a nearest relative as a factual circumstance that will give rise to liability, but that is too narrow . . . It is often forgotten in discussions of so-called 'damage by remote effect' (*Fernwirkungsschaden*), that it is

a question of the immediate application of BGB § 823 par. 1, and when, as here, there is fault and causation, then there is a claim under BGB § 823 par. 1. Accordingly, in general, it does not matter whether the plaintiff was engaged to her companion or not. It may be that, as a rule, news of the death of a person is only sufficient to cause an injury to health to another when that person is a near relative. But this is not a case of nervous shock brought on by the news of a person's death but of a consequence produced by the immediate experience of the death of another person. That such a psychically mediated causation should be recognized is an obvious consequence of the wording of BGB § 823 par. 1."

**Bundesgerichtshof, May 11, 1971, BGHZ 56, 163**

The plaintiff's husband, a sixty-four-year-old man, was killed in a traffic accident for which defendant was responsible. The plaintiff, a fifty-year-old, suffered injury to her health upon learning that he had died. She was not present when the accident occurred. The court described the circumstances under which she could recover and then remanded the case for further findings.

"The decision of the appellate court is not to be sustained insofar as it affirms that in general, a pure injury to the plaintiff's health is caused by the news of an accident. (See BGH, Decision of 9 November 1965, Sixth Civil Senate 260/63 = VersR 1966, 283, 285ff. OLG Freiburg VZ 1953, 709, 705.)

The law in force deliberately rejects – aside from some particular cases that do not matter here – a claim for harm through mental pain insofar as the pain is not itself the result of an injury of one's own body or one's own health. It is consistent with this decision of the legislator that a person has an independent claim who has been caused a physical or mental/psychological injury to his health by the effect of experiencing an accident or receiving news of it. The recognition of a claim for compensation is not barred by the circumstance that in a particular case this unusual reaction to the experience occurred only on the basis of a preexisting organic or physical instability and that the experience of the accident therefore had only the effect of setting it off. The suggestion of Stoll to the contrary (*Gutachten für den 45. Deutschen Juristentag*, 1964, p. 20) can therefore not be accepted . . .

Otherwise, it must be noted that, according to general knowledge and experience, a strong negative experience that gives rise to such feelings as pain, sorrow and horror usually disturbs physiological processes and mental functions in noticeable ways. It would be inconsistent with the binding decision of the enacted law to recognize such disturbances as injuries to health within the meaning of BGB § 823 par. 1 (Stoll, *op. cit.*, pp. 19ff.). Rather, in cases in which the psychologically mediated effect on health is not willed by the actor, then, independent of the issue of adequate causation, recovery must be limited to such harms which are considered to be injuries to body or health, not merely from a medical point of view, in the

normal affairs of life (Stoll, *op. cit.*, p. 21; see the numerous references to the inconsistent practice of the courts of first instance in Blick, *Haftung für psychisch verursachte Körperverletzungen*, Dissertation Freiburg, 1970, pp. 7 ff.).

Consequently, under some circumstances, injuries must go without compensation which, indeed, are medically verifiable, but do not have the character of ‘shock-like’ incursions on health so, as a rule, there can be no independent claim for compensation for disadvantages to one’s state of health which are often not small ones that experience shows accompany a deeply experienced sorrowful event.”

### **Landgericht, Hildesheim, Oct. 25, 1968, VersR 1970, 720**

The plaintiff sought to recover for shock she experienced on learning that her husband had been in an accident, caused by the defendant, which had slightly damaged the car which he owned and was driving. The *Landgericht* denied recovery on the grounds that it is outside normal experience that such an event would cause an injury to the health of a person who had not even experienced the accident herself. Therefore, there was no “adequate causal relationship” between her injury and the accident for which the defendant was responsible.

## **II. THE CONDUCT FOR WHICH ONE IS LIABLE**

### **1. Introduction**

A fundamental idea in civil law and modern common law is that there are three distinct grounds for holding a person liable in tort: he might have harmed someone intentionally, or negligently, or by engaging in an activity for which he is strictly liable. In civil law, this distinction is ancient. In Roman law, a plaintiff could recover under the *lex Aquilia* for harm the defendant caused by *culpa*, that is, by fault.<sup>1</sup> In the broad sense, fault included *dolus* or intentionally causing harm.<sup>2</sup> Most often, however, the Romans had in mind what we call negligence. As we will see, if the defendant was not at fault, sometimes the plaintiff could still recover, though not under the *lex Aquilia*. The cases in which he could were heterogeneous. Eventually, the Romans lumped them together as “quasi torts” (*quasi ex delicto*).<sup>3</sup>

This distinction passed into the modern civil codes. According to Article 1240 of the French Civil Code, “[a]ny act of a person which causes harm to another obligates the person through whose fault the harm (*dommage*) occurred to make compensation for it.” French commentators

1. See Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990), 1007–9.

2. *Ibid.* 1005, 1027.

3. Inst. 4.5.

explain (correctly) that this article was meant to govern harm caused intentionally. According to Article 1241, “[a] person is liable for the harm that he causes not only by his acts but by his negligence or imprudence.” Section 823(1) of the German Civil Code provides that “a person who intentionally or negligently unlawfully (*widerrechtlich*) injures the life, body, health, freedom, property or similar right (*sonstiges Recht*) of another is bound to compensate him for any damages that thereby occurs.”

Chinese law is intentionally vague on its liability regimes as it does not distinguish, on the face of the statute, intention from negligence. According to Article 6 of the Tort Liability Law, “[a] person is liable in tort for the infringement of other’s civil rights through his fault.” This provision will be replaced by a similarly worded article in Chinese Civil Code Article 1165-1: “Where an actor harmed another’s civil interests and caused damage through his fault, he shall be liable in tort.” In plain Chinese, the term *guocuo* simply means “having committed wrong or made a mistake.”<sup>4</sup> When defining *guocuo*, intention is irrelevant. *Guoshi* means “careless mistakes.”<sup>5</sup> In that respect, *guocuo* is somewhat like the Latin word for fault, *culpa*, which, in the narrow sense, simply refers to negligence. To the Roman jurists, *culpa* in the broader sense meant intentional as well as negligent fault. Similarly, virtually all leading treatises and textbooks in China explain that fault includes acts that are either intentional or negligent. Although that interpretation is universally accepted in China, some scholars writing in English have argued that fault (*guocuo*) means negligence (*guoshi*) and therefore the tort regime in China is based on negligence.<sup>6</sup> Others have said that the distinction between fault and negligence cannot matter under Article 6 because it does not draw that distinction.<sup>7</sup> Therefore, fault only refers to “the breach of the duty of care to which a reasonable person must adhere.”<sup>8</sup> Chinese authorities seem to have a better understanding of the meaning of Article 6 than the English speaking commentators. If one person shoots another, he may have acted unreasonably because he shot to kill or because he was insufficiently careful. If he acted carefully, he may not have acted unreasonably at all. It is hard to imagine what liability in tort for fault would look like if this distinction is ignored, or if fault meant only negligence. Here, as elsewhere, the drafters of Article 6 of the Tort Liability Law and Article 1165 of the Chinese Civil Code were using a Chinese term to express principles of Western law in which liability for fault is liability for intentional or negligent misconduct.

4. See 古代汉语词典 [Dictionary of Classical Chinese] 526 商务印书馆 [Commercial Press] (2010).

5. *Guoshi* means wrong committed carelessly and without intention [不意误犯, 谓之过失]: *Book of Punishment History of Jin* [《晋书 刑法志》].

6. See Jacques Delisle, “A Common Law-Like Civil Law and a Public Face for Private Law: China’s Tort Law in Comparative Perspective,” in *Towards a Chinese Civil*

*Code: Comparative and Historical Perspectives* (Lei Chen and C.H. van Rhee, eds., 2012), 354.

7. See Yan Zhu, “The Bases of Liability in Chinese Tort Liability Law – Historical and Comparative Perspectives,” in *Towards a Chinese Civil Code: Comparative and Historical Perspectives* (Lei Chen and C.H. van Rhee, eds., 2012), 342.

8. *Ibid.*

Though there is no need to be specific about intention or negligence in establishing fault liability, the new Chinese Civil Code tends to be more specific about the requisite basis for liability in exceptional circumstances. For example, Article 1232 recognizes intentional violation of statutes as a prerequisite in allowing punitive damage in pollution claims. Also, Article 1185 provides that punitive damages are permissible for intentional infringement of intellectual property rights. Article 1240 provides that the victim's intention is a defense, and that gross negligence is a mitigating circumstance in liability resulting from the defendant's conduct of abnormally dangerous activities.

Neither the French nor the German Code provided for liability without fault, but, as we will see, French courts and the German legislature have recognized such liability. The Chinese Tort Liability Law does so explicitly. Thus in all of these jurisdictions, the grounds for liability are those recognized by the Romans: intent, negligence, and in certain situations, liability without fault.

Until the nineteenth century, the common law did not draw these distinctions. As we saw earlier, the plaintiff had to bring his case within one of the recognized forms of action. If the defendant had struck him, he could sue for trespass in assault and battery, if the plaintiff had entered his land he could sue for trespass *quare clausum fregit*, and so forth (see, above pp. 308–309). If the facts did not quite fit any of the trespass actions, he could bring an action called trespass on the special case or trespass on the case. He might do so, for example, if the plaintiff did not strike him but did something that caused him to be physically injured. In trespass on the case, he would have to plead the special facts that, in his view, entitled him to recover. Whether he could recover on these facts was up to the judges.

There is a long-standing debate over whether the plaintiff was liable in either type of action absent fault. As Milsom and Fifoot have pointed out, the question is misleading because, traditionally, the common lawyers did not clearly distinguish fault-based and strict liability.<sup>9</sup>

If the plaintiff sued in one of the trespass actions, he did not need to allege fault. For example, he might simply allege that the defendant shot him or struck him. The defendant might then “plead the general issue” by answering with the set phrase “not guilty.” Or he might set up a defense by making a special plea, in effect, admitting the trespass and offering some justification. It is hard to tell whether either course of action would allow a defendant to escape liability if he was not at fault in the sense in which civil lawyers or modern common lawyers understand fault. Suppose, for example, that the defendant struck the plaintiff because his horse bolted, either because the horse was high strung or because it was frightened by a flash of lightning or a third party or an animal. If the defendant pled, “not guilty,” the jury was supposed to decide whether this allegation was true or false, originally, without instructions from the judge as to what to consider.

9. S.F.C. Milsom, *Historical Foundations* Fifoot, *History and Sources of the Common of the Common Law* (1981), 392–8; C.H.S. Law Tort and Contract (1949), 189, 191.

It is hard to know what juries did.<sup>10</sup> They may have found for the defendant if they believed that the bolting of the horse that he was riding was really not something he did, that he was the passive instrument of forces of nature, a third party, or the animal he was riding. Possibly, they did so if they believed that he had not committed a trespass or wrong, whatever that might have meant to them. In the trespass actions, the common law did not really have a rule in such cases but a procedure: let the jury decide.

The defendant's other alternative was to plead, in justification, that he was not at fault. It was not clear what would happen then. Defendants did so in only a few cases, and the remarks of the judges are confusing and seem contradictory. Some judges said that the defendant was not liable if he had done his best,<sup>11</sup> some said that he was,<sup>12</sup> and some said he could escape liability if his conduct were the product of "unavoidable necessity."<sup>13</sup> It is hard to know what these statements meant to the judges who made them. They may not have been thinking in terms of a clear distinction between fault-based and strict liability. For example, in *Weaver v. Ward*, when a company of part-time soldiers were drilling with muskets, one soldier injured another because his musket accidentally went off. He pleaded that it was not his fault. The court said that he would be excused if he were "utterly without fault," if the accident were "inevitable," and if he "had committed no negligence to give occasion to the hurt."<sup>14</sup> As Fifoot said of this case, "[f]ault,' 'inevitable accident,' 'negligence' are words used indiscriminately without reflection and almost without meaning."<sup>15</sup>

On account of these uncertainties, the plaintiff might sue, not in a trespass action, but in trespass on the case and allege that the defendant acted negligently in his statement of the facts that supposedly called for relief. Sometimes, the plaintiff did so.<sup>16</sup> But even then, it is not clear what the allegation meant.<sup>17</sup> It might or might not mean negligence in the modern (or ancient Roman) sense. Certainly, judges did not instruct the jury to ask themselves whether the defendant had behaved like a

10. Milsom, *Historical Foundations of the Common Law*, 393.

11. E.g., *The Thorns Case*, Y.B. Mich. 6 Ed. 4, f. 7, pl. 18 (1466) (Choke, C.J.: "As to what has been said that they [thorns] fell ipso invito [on another's land], this is not a good plea; but he should have said that he could not do it in any other manner or that he did all that was in his power to keep them out"); *Millen v. Fandrye Popham* 161 (1626) (defendant excused because he has "done his best endeavor"); *Wakeman v. Robinson*, 1 Bing. 213 (1823) (Dallas, C.J.: "If the accident happened entirely without default on the part of the defendant or blame imputable to him, the action does not lie").

12. *The Thorns Case*, Y.B. Mich. 6 Ed. 4, f. 7, pl. 18 (1466) (Littleton, J.: "If a man suffers damage, it is right that he be recompensed."); *Bessey v. Olliot*, Sir T. Raym. 421, 467 (1682) (Sir Thomas Raymond: "in all civil acts the law doth not

so much regard the intent of the actor as the loss and damage of the party suffering"); *Leame v. Bray*, 3 East. 593 (1803) (Grose, J.: "if the injury be done by the act of the party himself at the time or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass").

13. *Dickenson v. Watson*, Sir T. Jones 205 (1682) (defendant who had shot the plaintiff and pleaded accident not excused "for in trespass the defendant shall not be excused without unavoidable necessity").

14. *Weaver v. Ward*, Hobart 134 (1616).

15. Fifoot, *History and Sources of the Common Law*, 191.

16. Milsom, *Historical Foundations of the Common Law*, 394.

17. *Ibid.* 399; A.I. Ogus, "Vagaries in Liability for the Escape of Fire," *Cambridge Law Journal* 27 (1969), 104, 105–6.



reasonable person. In any event, the defendants also brought actions of trespass on the case without alleging negligence.<sup>18</sup>

In the nineteenth century, the forms of action were abolished: the plaintiff could merely plead the facts that entitled him to recover without naming a certain form of action. Supposedly, the substantive law remained the same: the plaintiff could recover after the forms of action were abolished provided that he could have recovered under one of them before they were abolished. In fact, the law changed a good deal.

One of the changes was the rise of what we now call an action in negligence. A first step was to hold that the plaintiff could not recover for bodily injuries which the defendant caused accidentally and without negligence. In the United States, this step was taken in Massachusetts in 1851 by Chief Justice Shaw.<sup>19</sup> In England, it was not taken until 1891.<sup>20</sup> In the 1870s, some courts also held that a defendant would not be liable for trespass to land if he acted neither intentionally nor negligently.<sup>21</sup> As Prosser pointed out, it would be illogical not to take this step as well: it was “no great triumph of reason” to hold that if a streetcar jumped its track, its operator was liable for injuring a pedestrian if he was negligent, but that he was liable, negligent or not, for injuring the plate glass window behind the pedestrian.<sup>22</sup> In his first edition, written in 1941, Prosser could only say that “indications are” that the old rule for trespass to land “is undergoing modification.” The indications he cited were the first Restatement of Torts and four cases, three of them decided in the 1870s.<sup>23</sup>

Having recognized a tort of “negligence,” Americans concluded that the defendant must have acted intentionally to be liable in one of the trespass actions such as battery. As we have seen, in England, in 1965, Lord Denning took that position, although there is still a dispute over whether he was right.<sup>24</sup> English courts agree, however, that the defendant is not liable for committing these torts if he acted neither intentionally nor negligently.<sup>25</sup>

The common law courts also recognized that in certain cases the defendant was liable without fault. The first case was *Rylands v. Fletcher*,<sup>26</sup> in which the owner of a reservoir was held liable without fault when the water escaped. The case was followed in the United States where eventually the principle was said to be that the defendant is liable for carrying on abnormally dangerous activities.

18. *Ibid.* 394.

19. 60 Mass. 292 (1850).

20. *Stanley v. Powell*, 1 Q.B. 86 (1891).

21. See *River Wear Commissioners v. Adamson* [1877] 2 App. Cas. 743, 751, in which Lord Cairns said that one was liable at common law for “damage occasioned by wilful or negligent misconduct” as distinguished from “act of God.”

22. William L. Prosser, *Handbook of the Law of Torts* (1941), 77–8.

23. *Ibid.*, citing *Nitro-Glycerine Case*, *Parrott v. Wells Fargo & Co.*, 15 Wall 524 (U.S. Sup. Ct. 1872), 21 L. Ed. 206; *Brown v. Collins*, 53 N.H. 442 (1873); *Loosee v. Buchanan*, 51 N.Y. 476 (1873); and cf. *Dobrowski v. Penn. R. Co.*, 178 A. 488 (Pa. 1935).

24. [1965] 1 QB 232.

25. In *Stanley v. Powell* [1891] 1 Q.B. 86; *Fowler v. Lanning* [1959] 1 Q.B. 156.

26. [1826] L.R. 3 H.L. 330.

Thus by the twentieth century, the common law had recognized the same three grounds for liability as the civil law had recognized for centuries.

## 2. Intent

### a. The Intention to Do Harm or to Do Wrong

#### Civil Law

**François Terré, Philippe Simler, Yves Lequette, and François Chénéde, *Droit civil Les obligations* (12th edn., 2019), § 955**

*“Intentional fault.* This fault, which is also called delictual, must be defined in the same way as intentionally wrongful fault (*faute dolosive*) in the area of contracts. It exists when the author of the harm acted intentionally in order to cause a prejudice to another and probably when he acted in a manner that he must have known would injure another.”

**Wolfgang Fikentscher and Andreas Heinemann, *Schuldrecht Allgemeiner und besonderer Teil* (11th edn., 2017), no. 647**

“In contrast to negligence, the concept of intent is not defined in the German Civil Code but left for legal scholarship and case law to clarify. According to the prevailing view, a person acts intentionally who mentally *envisions* the result of his action and receives it in his *will* even though he *knows* that it is a violation of duty. Intention is therefore the knowledge and will for an unlawful result, or more precisely, the knowledge and will for a result with the awareness that it is unlawful.”

#### Chinese Law

**Wang Shengming, *Interpretations on the Tort Liability Law of the PRC* (2nd edn.) (Official Interpretations by National People’s Congress (2nd edn., Peking, 2013)), 45**

“[Intention means] the mental state of the actor who knows that his act will give rise to the harmful consequence, yet was willing to let it happen or was insensitive to the consequence.”

#### Common Law

**Edwin Peel and James Goudkamp, *Winfield and Jolowicz on Tort* (19th edn., 2014), 58, 427**

“For a battery to be committed there must be an act by the defendant that involves contact with the claimant. D does not commit battery against C if X seizes D’s arm and uses it like a club to hit C (X and X alone is liable in this scenario). The act need be intentional only as to the contact, and an intention to cause harm is not required.

[I]t is clear law that an entry upon another's land is tortious whether or not the entrant knows that he is trespassing. Thus it is no defence that the only reason for his entry was that he had lost his way or even that he genuinely but erroneously believed that the land was his. It follows that the great majority of trespasses to land are, for legal purposes, self-evidently intentional – I intend to enter upon your land if I consciously place myself upon what proves to be your land even though I neither knew nor reasonably could have known that it was not mine.”

**Ellis v. D'Angelo, 253 P.2d 675 (Cal. App. 1953)**

“According to the allegation the plaintiff was by the minor defendant ‘pushed, impelled and knocked . . . violently to the floor’ and suffered serious injuries including a fracturing of the bones of both her arms and wrists.” At the time, the defendant was four years old.

“[A]n infant is liable for his torts even though he lacks the mental development and capacity to recognize the wrongfulness of his conduct so long as he has the mental capacity to have the state of mind necessary to the commission of the particular tort with which he is charged. Thus as between a battery and negligent injury an infant may have the capacity to intend the violent contact which is essential to the commission of battery when the same infant would be incapable of realizing that his heedless conduct might foreseeably lead to injury to another which is the essential capacity of mind to create liability for negligence.”

*Note on the “Intention” Required by the Common Law.* In England and the United States, the standard view is that to be liable for intent, the defendant need not intend to do wrong. He merely needs to intend to do the act that defines the tort in question: the unauthorized contact, the entry on land, the carrying off of goods, and so forth. To call this the traditional position of the common law is misleading. As we have seen, before the nineteenth century, the common law did not distinguish between intention and negligence as a basis for liability. The question of what the defendant must have intended did not arise.

It did arise once it became accepted that the defendant was only liable for intentional and negligent conduct. But to two of the first to write systematic treatises on tort law – Sir Frederick Pollock and John Salmond – it seemed obvious that if the defendant were to be liable for acting intentionally, then the intention that mattered in principle must be the intention to cause harm or do wrong. Both writers were familiar with Roman law and the civil law of their own day. They thought the intent required must be the same in common law as in civil law. Pollock claimed that in the case of “personal wrongs” such as battery, assault, false imprisonment, slander and libel, liability is imposed where, “generally speaking, the wrong is wilful or wanton. Either the act is intended to do harm, or, being an act evidently likely to cause harm, it is done with reckless indifference to what may befall

by reason of it.”<sup>1</sup> He concluded that “the Roman conception of delict agrees very well with the conception that appears really to underlie the English law of tort.”<sup>2</sup> According to Salmond, “[i]n general, though subject to important exceptions, a tort consists in some act done by the defendant whereby he has wilfully or negligently caused some form of harm to the plaintiff.” There must be (a) damage and (b) “wrongful intent or culpable negligence.”<sup>3</sup>

The problem was that under the common law forms of action, the defendant could be held liable even if he did not intend to do harm or wrong. Pollock addressed that problem when he discussed trespass to land and to chattels. He acknowledged that the defendant might be liable when he came on plaintiff's land even though he thought it was his own. In such cases, he said, there is an “absolute duty not to meddle . . . with land or goods that belong to another.”<sup>4</sup> For a moment, he considered discarding this rule as an archaic feature of the forms of action that had no place in modern law. “We are now independent of the forms of action.” “[A] rational exposition of tort law is free to get rid of extraneous matter brought in, as we have shown, by the practical exigency of conditions that no longer exist.”<sup>5</sup> But he decided that the traditional rule was innocuous because it usually gave the right result. “A man can but seldom go by pure unwitting misadventure beyond the limits of his own dominion.”<sup>6</sup> “If not wilfully or wantonly injurious, it is done with some want of due circumspection, or else it involves the conscious acceptance of a risk.” Thus in all but “exceptional cases,” strict liability would not result in “real hardship.”<sup>7</sup> Thus for Pollock, in principle, intent-based liability required an intention to do harm wrongfully. Liability for trespass to land and chattels was not based on intent.

But the problem went beyond trespass to land and chattels. Traditionally, liability for battery, assault, false imprisonment, and defamation had not turned on whether the defendant had acted intentionally any more than on whether he had acted negligently. Consequently, the defendant could not escape liability by proving that he had been mistaken as to the identity of the victim, or the existence of a privilege, or whether a statement was defamatory, any more than he could escape liability for trespass to land by proving he was mistaken as to privilege or ownership. One approach would have been to say, as Pollock did, that since we are now independent of the forms of action, we should re-examine whether such a defendant should be liable. But that was not the approach of the treatise writers who were his near contemporaries. They took it for granted, as he did, that if liability were to be based on intent, the intent that mattered was an intent to do harm or wrong. But they invented reasons why the law imposed liability even absent that intent. According to Vold, the defendant

1. Sir Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (8th edn., 1908), 9.

2. *Ibid.* 17.

3. John W. Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (4th edn., 1916), 8.

4. Pollock, *The Law of Torts*, 10.

5. *Ibid.* 15.

6. *Ibid.* 16.

7. *Ibid.* 11.

was liable for mistakes in identity because “the risk . . . should be placed on the intentional wrongdoer rather than his innocent victim.”<sup>8</sup> He did not explain why an actor who made a reasonable mistake should count as a wrongdoer. According to Smith, “an *intentional* entry standing alone and unexplained involves fault.”<sup>9</sup> He did not ask why the law will not let such a person make an explanation. Salmond thought that the reason was “the evidential difficulties in which the law would find itself involved if it consented to make any inquiry into the honesty and reasonableness of a mistaken belief which a defendant set up as an excuse for his wrongful act.”<sup>10</sup>

He did not say why the defendant was held liable even if there were no evidential difficulties. These writers thus suggested that the law had already considered and answered a question which, in fact, no one had faced: whether, if liability were to depend on intent, the defendant should be held liable absent an intent to do wrong or harm.

This approach paved the way for the quite different one taken by Seavy, Harper, Prosser, the Restatements, and English writers today.<sup>11</sup> They took it for granted that the defendant who did not intend harm or wrong could be held liable. According to them, however, the reason was that the kind of intention that mattered was different. According to Seavy, it was the intention “to deal with the things or with the interests of others.” He claimed that “[t]he liability of one whose words unexpectedly prove to be defamatory can be based, in most instances, on his intent to deal with another’s reputation.” “[M]ost nuisance cases,” he said, “involve a realization by the defendant that he is interfering with the factual interests of others.”<sup>12</sup> Similarly, Harper claimed that the intention that matters is “to violate a legally protected interests of the plaintiff.”<sup>13</sup> In the case of trespass to land or chattels the defendant need merely intend “the immediate effect of his act which constituted the interference with plaintiff’s possession.” Therefore a mistake as to ownership or privilege was no defense.<sup>14</sup> To be liable for defamation “the defendant must have intended to publish the defamatory matter, i.e., he must have voluntarily published the statement which harms the plaintiff’s reputation and thus invades his legally protected interests.” But he need not have intended that anyone’s reputation be harmed.<sup>15</sup> Similarly, Prosser said that the intention that matters is not a desire to do harm but “an intent to bring about a result which will invade the interests of another in a way the

8. Lawrence Vold, 9 *Neb. L. Rev.* 17 (1938), 149.

9. Jeremiah Smith, “Tort and Absolute Liability – Suggested Changes in Classification – II,” *Harv. L. Rev.* 30 (1917), 319.

10. Salmond, *The Law of Torts*, 116.

11. Beale had yet another explanation. He said that someone who enters land mistakenly thinking it is his own “acts on a mistake as to his own authority.” The mistake cannot “give him an authority which in law or in fact he lacks.” Joseph H. Beale, “Justification for Injury,” *Harv. L. Rev.* 41 (1928), 553. He did

not explain why one who enters land without authority and without believing that he has authority is liable only if the entry is negligent but one who makes such a mistake is liable without negligence.

12. Warren Seavy, “Principles of Torts,” *Harv. L. Rev.* 56 (1942), 72.

13. Fowler Vincent Harper, *A Treatise on the Law of Torts: A Preliminary Treatise on Civil Liability for Harms to Legally Protected Interests* (1933), 41.

14. *Ibid.* 55.

15. *Ibid.* 504.

law will not sanction.”<sup>16</sup> He drew the same conclusions as Harper. So did the Restatements.<sup>17</sup> So do English writers such as W.V.H Rogers, R.F.V. Heuston and R.A. Buckley.<sup>18</sup> And in this way, Anglo-American jurists finally arrived at what is sometimes termed the traditional position of the common law.

## **b. The Intent to Cause a Different Harm or Commit a Different Tort**

### **Law in the United States**

#### **Talmage v. Smith, 59 N.W. 656 (Mich. 1894)**

“On the evening of September 17, 1891, some limekilns were burning a short distance from defendant’s premises, in Portland, Ionia county. Defendant had on his premises certain sheds. He came up to the vicinity of the sheds, and saw six or eight boys on the roof of one of them. He claims that he ordered the boys to get down, and they at once did so. He then passed around to where he had a view of the roof of another shed, and saw two boys on the roof. The defendant claims that he did not see the plaintiff, and the proof is not very clear that he did, although there was some testimony from which it might have been found that plaintiff was within his view. Defendant ordered the boys in sight to get down, and there was testimony tending to show that the two boys in defendant’s view started to get down at once. Before they succeeded in doing so, however, defendant took a stick, which is described as being two inches in width and of about the same thickness and about 16 inches long, and threw it in the direction of the boys; and there was testimony tending to show that it was thrown at one of the boys in view of the defendant.” The stick missed him and struck the plaintiff.

“The right of the plaintiff to recover depend[s] upon an intention on the part of the defendant to hit somebody, and to inflict an unwarranted injury upon some one. Under these circumstances, the fact that the injury resulted to another than was intended does not relieve the defendant from responsibility . . . The case is to be distinguished from a case of negligence on the part of defendant. The act is found by the jury to have been a willful act.”

#### **Wyant v. Crouse, 86 N.W. 527 (Mich. 1901)**

“The plaintiffs commenced an action by declaration against the defendant to recover damages for the destruction of a blacksmith shop

16. Prosser, *Law of Torts*, 40–1.

17. Restatement of Torts § 13, § 13 cmt. d, § 158, § 158 cmt. e, § 577, § 580 (1934); Restatement (Second) of Torts § 13, § 13 cmt. c, § 158, § 158 cmt. f (1965). In response to the constitutional challenges to no-fault liability, the second Restatement changed its rules to include a requirement of fault for liability in

defamation. Restatement (Second) of Torts §§ 580, 581.

18. W.V.H. Rogers, *Winfield and Jolowicz on Tort* (15th edn., 1998), 66, 472–3; R.F.V. Heuston and R.A. Buckley, *Salmond and Heuston on the Law of Torts* (21st edn., 1996), 41, 121.



and other property by fire. The declaration stated that he wrongfully broke into the shop, and started a fire in the forge, and the undisputed proof shows that he did so . . .

The testimony shows that the defendant was a blacksmith, who sometimes worked in the shop for plaintiffs' son, who occupied the shop as plaintiffs' tenant; that on this occasion he went to the shop to sharpen some shoes, built a fire in the forge, did his work, and went away. It is in evidence that the wind was blowing, and that, about 10 minutes after he went away, the shop was discovered to be on fire in the southwest corner of the building, the forge being in the northeast corner, and the flames coming out from the roof . . .

We agree with the circuit judge that there is no proof tending to show an absence of ordinary care, but there certainly is proof tending to show that the only fire on the premises came from that started by the defendant . . .

In the case before us, the defendant intended no such injury, nor did he any act which can be said to have given reason for expecting the consequences. It was a fortuitous consequence of his act, entirely unforeseen . . .

The liability of the defendant is based upon a wrongful act, and the nature of the act, and not the consequences, determines his liability. He was engaged in an unlawful act, and therefore was liable for all of the consequences, indirect and consequential as well as direct, and there is no occasion to discuss the degree of his negligence in permitting the shop to burn, if the fire was caused by the fire he built."

[Normally, the plaintiff would have recovered in trespass. Since the statute of limitations had run for a trespass action, the court allowed him to recover in trespass on the case.]

### **English Law**

In English criminal law, if A shoots at B and hits C, he would be guilty of intentionally shooting C under a doctrine called "transferred malice." English courts have not yet ruled on whether there is a similar doctrine in tort. The case below comes from Northern Ireland.

### **Livingstone v. Ministry of Defence, [1984] N.I. 356 (C.A.) (Northern Ireland)**

"It was common case that on the afternoon of Sunday, 23 September 1979, the plaintiff was struck and injured by a baton round [a plastic bullet] fired by a soldier at a time when the security forces had cordoned off streets in the vicinity of Davis Street and Millfield in Belfast in order to prevent an unlawful procession reaching the centre of the city . . . The defence did not plead any specific defence justifying the firing of the baton round, such as that the baton round was fired to disperse rioters, or constituted such force as was reasonable in the circumstances in the prevention of crime under section 3(1) of the Criminal Law Act (Northern Ireland) 1967, or that the baton round was fired in self-defence." The

plaintiff sued for negligence and for “assault, battery and trespass.” The court below dismissed the first claim on the ground that the plaintiff had not shown negligence. The plaintiff appealed from his failure to rule on the second claim.

“Mr. Kerr’s principal submission in reply to this question was that the tort of battery was not committed unless the defendant, or the servants or agents of the defendant, deliberately fired a round with the intention of striking the plaintiff, and Mr. Kerr submitted that if, in dispersing a riot, a soldier fired a shot at one rioter in the riotous crowd but missed him and struck another rioter in the crowd, the soldier had not committed battery against the rioter who was struck (assuming that the force used was unjustified) because the soldier had not intended to hit that particular rioter. Therefore Mr. Kerr argued that the soldier who fired the baton round which struck the plaintiff was not guilty of the tort of battery towards him, because there was no evidence that the soldier had intended to hit the plaintiff and the soldier may well have intended to hit a rioter but struck the plaintiff by mistake.” Kerr cited Lord Denning M.R. in *Letang v. Cooper* [1965] 1 Q.B. 232 at page 239D [“If one man intentionally applies force directly to another, the plaintiff has a cause of action in assault and battery, or, if you so please to describe it, in trespass to the person.”] and Winfield & Jolowicz on Tort (12th edn.) at page 54 [“Battery is the intentional and direct application of force to another person.”]

“However, I consider it to be clear that when Lord Denning and Winfield and Jolowicz refer to doing an injury ‘intentionally’ or to the ‘intentional’ application of force, they mean that the application of force towards some person is intended, even although the person directly struck may not be the person whom the assailant intended to strike. In my judgment when a soldier deliberately fires at one rioter intending to strike him and he misses him and hits another rioter nearby, the soldier has ‘intentionally’ applied force to the rioter who has been struck. Similarly if a soldier fires a rifle bullet at a rioter intending to strike him and the bullet strikes that rioter and passes through his body and wounds another rioter directly behind the first rioter, whom the soldier had not seen, both rioters have been ‘intentionally’ struck by the soldier and, assuming that the force used was not justified, the soldier has committed a battery against both.” In support the court cited *James v. Campbell* (1832) 5 Car. & P 372, 172 E.R. 1015:

“It appeared that, at a parish dinner, the plaintiff and defendant (who it seemed were not on good terms, in consequence of something which took place with respect to a leet jury), together with a Mr. Paxton and others were present. Mr. Paxton and the defendant quarreled, and had proceeded to blows, in the course of which the defendant struck the plaintiff, and gave him two black eyes, and otherwise injured him . . .

Mr. Justice Bosanquet (to the jury). If you think as I apprehend there can be no doubt, that the defendant struck the plaintiff, the plaintiff is entitled to your verdict, whether it was done intentionally or not.”

### German Law

#### **Oberlandesgericht, Schleswig, August 10, 1976, VersR 1977, 718**

"The plaintiff and the defendant (born 18 September 1960) were school fellows at a high school. On 18 December 1974, during class, the defendant threw a so-called geometry triangle made of plastic in the direction of student E. who was sitting in the next row diagonally to the right. The triangle flew by him and struck the plaintiff who was sitting diagonally behind him, striking his left eye which was seriously injured.

The plaintiff ... claimed that the defendant had already had a quarrel with E. in the break before class and that this continued into the German lesson. She intentionally threw the triangle at him in order to hit him. It reached and struck the unsuspecting plaintiff only because E. ducked his head.

The defendant ... claimed that the quarrel between her and E. had nothing to do with the throwing of the triangle. He had tapped her lightly, and she thought that he wanted to have the triangle back, and so she threw it with a gentle motion in his direction."

[Injuries in school are covered by a German social insurance statute which provides that a civil action can be brought against a person who harms another only if he did so intentionally. RVO §§ 539, 540, 636 ff.]

"It does not matter with what motivation the defendant threw the triangle in the direction of E. who was sitting diagonally behind her. It is irrelevant to the circumstances necessary for the exclusion of liability of the RVO whether it is determined that, as the plaintiff maintains though contradicted by the testimony of witnesses, she wished to give back the triangle she had borrowed from him or that, instead, she threw the triangle after a quarrel and to carry out a more or less serious prank or possibly also to cause pain. For if the defendant did act intentionally with regard to an injury to E., albeit an insignificant one, that does not have the least importance as regards the plaintiff who was completely disinterested. She certainly did not wish to injure him. The plaintiff can show nothing to the contrary. Her conception is unfounded that an intention must be ascribed to the defendant as regards plaintiff which is the same as the intention the defendant had as regards E. because of 'aberratio ictus' [which means 'a blow gone astray']. That legal expression describes an event that, on the contrary, is a typical case of negligence as regards the person struck to whom the conduct of the actor – here the throw – did not relate."

### French Law

#### **Cour de cassation, 1<sup>e</sup> ch. civ., January 5, 1970, D.S. 1970.J.155**

One night the son of the insured party shot at some burglars to prevent them from escaping. He killed a neighbor who had been standing in the

window of his own house and whom he did not see. The *Cour d'appel* held that the act was not intentional and therefore the defendant insurance company was liable despite Article 12(2) of the Law of July 13, 1930 of the Insurance Code. The defendant argued that the shooting of the neighbor was intentional whether the son had been trying to hit the burglars or trying to shoot out the tires of their car. The *Cour de cassation* upheld the decision below. It said: "There is no intentional fault within the meaning of art. 12(2) of the Law of 13 July 1930 unless the harm that occurred was wanted by its author."

**Note.** Nevertheless, French courts do not require that the author wanted to cause all of the harm that occurred. Cass, 1st Civ. Ch., June 7, 1974 Bull. civ. 1974.147 no. 168 (rugby player who kicked another player held to have intentionally caused more harm than he wanted to inflict).

**Cour de cassation, 2<sup>e</sup> ch. civ., December 14, 1987, arrêt no. 1.307, pourvoi no. 86-17.537**

Pierre Prebose, while hunting, came on Henry Escalette's property where there was a "no trespassing, no hunting" sign. For him to come there to hunt was a violation of Articles 365 and 374 of the Rural Code (*Code rural*). While he was standing a few meters from Escalette's house, Escalette in a "gesture of irritation," grabbed the rifle that Prebose was carrying and struck it against a block of cement in an effort to break it. The rifle went off twice and injured Escalette who sued for compensation. The *Cour d'appel* of Toulouse rejected his claim under Article 1382. The *Cour de cassation* said:

Whereas, in rejecting the claim of the victim, the decision [below] merely noted that the accident would not have happened if M. Escalette had not committed the 'folly' of taking away the weapon and striking it against a concrete block; Whereas in so determining, even though M. Prebose was hunting with a loaded rifle on the property of M. Escalette and a few meters from his house despite a sign prohibiting anyone from entering and hunting, the *Cour d'appel* did not give its decision a legal justification, the decision below is quashed and the case remanded to the *Cour d'appel* of Pau.

**Note.** In the previous case, the defendant did not intend to harm the plaintiff or his property. Nor does it seem he behaved negligently: would a careful hunter remove his cartridges before entering another's land because otherwise an incensed owner might grab his weapon, strike it against a cement block, and cause an injury? Consider why the court may have held the defendant liable anyway.

**Note on the History of Liability for the Unforeseen Consequences of Unlawful Activities.** Notice that Anglo-American courts that hold the defendant liable for the unforeseen consequences of an intentional act phrase their rule in two different ways. Sometimes they say, as in *Talmage v. Smith* (above p. 450), that "[t]he right of the plaintiff to recover depend[s] upon an

intention on the part of the defendant to hit somebody” and that it doesn’t matter who he hit.<sup>1</sup> That makes it sound as though there are two types of fault-based liability, intent and negligence, and that the defendant is liable because of his intent. But sometimes courts say, as in *Wyant v. Crouse* [above pp. 450–451], that “[t]he liability of the defendant is based upon a wrongful act, and the nature of the act, and not the consequences, determines his liability. He was engaged in an unlawful act, and therefore was liable for all of the consequences . . . .” That makes it sound as though there are three types of fault-based liability: intending a harm, negligently causing a harm, and engaging in an unlawful activity which led to the harm.

Modern textbooks say there are two kinds of fault based liability: intent and negligence. Nevertheless, the second way of stating the doctrine is the older one. It appears in Blackstone, who had been speaking about criminal liability. He did not apply it to civil liability: as already noted, the tort law of Blackstone’s day (if we may call it that) did not distinguish intention and negligence. Blackstone had taken the doctrine from two seventeenth-century English jurists, Matthew Hale<sup>2</sup> and Edward Coke.<sup>3</sup> They had taken it from the thirteenth-century English jurist Bracton. Bracton took it from the thirteenth-century canon lawyer Raymond of Penafort<sup>4</sup> who had been summarizing the canon law of his own time.<sup>5</sup>

Other canon law doctrines were adopted by civil lawyers, inherited by modern civil law, and borrowed by Anglo-American law. Examples are the doctrine of necessity which allows one person to use another’s property in time of great need, and the doctrine of changed circumstances which allows a party to escape his contractual obligations when circumstances have changed enough. But in this case, the doctrine was borrowed from canon law by the English and applied to tort law in the United States although it died out in continental Europe.

The canon lawyers accepted this doctrine, not because it was found in the texts they regarded as authoritative, but because it seemed to give the right result in a number of hypothetical cases. The earlier canonists rested it on three texts in the *Decretum*, a collection of authorities made by Gratian about 1140. One was a vague statement by St. Augustine that no one can be blamed for doing what is “good and lawful.”<sup>6</sup> Another was a ruling by the Council of Worms in 868 that a person who cuts down a tree which crushes a passer-by “while carrying out some necessary work” need

1. Similarly, the court said in *Livingstone v. Ministry of Defence*: “the application of force towards some person is intended, even although the person directly struck may not be the person whom the assailant intended to strike.”

2. Matthew Hale, *Historia Placitorum Coronae* 1 (S. Emyln and G. Wilson, eds., 1800), \*471–7. See also *ibid.* 429–30, 431, 466.

3. Edward Coke, *The Third Part of the Institutes of the Laws of England* (1817), \*56–7.

4. Raimundus de Penafort, *Summa de Poenitentia* (X. Ochoa and A. Diez, eds., 1976), II.i.3. For his influence on Bracton,

see F. Schulz, “Bracton on Raymond of Penafort,” *L.Q. Rev.* 61 (1945), 286, 289–90.

5. Stephan Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX* (1935), 201–7; James Gordley, “Responsibility in Crime, Tort and Contract for the Unforeseeable Consequences of an Intentional Wrong: A Once and Future Rule?” in *The Law of Obligations Essays in Celebration of John Fleming* (J. Stapleton and P. Kane, eds., 1998), 175, 184–6.

6. C. 23, q. 5, c. 8.

only do penance if acted “by will or by negligence.”<sup>7</sup> The third was a decision by Pope Urban I that a priest who killed a boy by throwing a stone should do penance as a homicide but would not be suspended from his functions as those guilty of homicide usually were. The text said nothing about why the priest threw the stone.<sup>8</sup>

Just because their authorities said so little, the canonists found themselves improvising. The earliest canon lawyers to consider the problem said that the priest would not be guilty if he threw the stone for a “reason” (*causa*)<sup>9</sup> or “good reason” (*iusta causa*)<sup>10</sup> and did so with “diligence” in a place where people were not walking. Later canonists explained that the priest had a “reason” to throw the stone if he was engaged in a “lawful” activity rather than an “unlawful” one.<sup>11</sup> The priest would not have been guilty if he threw the stone to chase a wild boar or a pig out of a field of grain unless he had been careless.<sup>12</sup> He would be guilty if he engaged in an unlawful activity or failed to use the diligence he should.<sup>13</sup>

That meant that there were three grounds for holding that a person was responsible because he had been at fault: he might have caused harm intentionally, negligently, or while engaging in an unlawful activity. This three fold distinction was repeated by Thomas Aquinas.<sup>14</sup> Curiously enough, the jurists who rejected the category of “engaging in an unlawful activity” were the late scholastics of the sixteenth century for whom Aquinas was an intellectual hero.

The reason the late scholastics rejected it was, in part, that it did not seem to give a sensible result in other hypothetical cases. Suppose someone is prohibited for religious reasons from working on Sunday<sup>15</sup> or from hunting<sup>16</sup> and, while violating these rules, he accidentally kills somebody. It would be strange to hold him responsible. Suppose someone catches his spouse in adultery and tries to kill the adulterer. In the law of their time, as in modern law, the attempt to kill is unlawful, and the adulterer is allowed to defend himself, killing his attacker if that is the only way to preserve his own life. If the adulterer did kill his attacker, it would be odd to say he was responsible for the death because adultery was unlawful. That would be

7. Dig. 50, c. 50.

8. Dig. 50, c. 37.

9. Paucapalea, *Summa über das Decretum Gratiani* (J.F. Schulte, ed., 1891; repr. Scientia Verlag, 1965), to D. 50 c. 37.

10. Stephanus Tornacensis, *Die Summa über das Decretum Gratiani* (J.F. Schulte, ed., repr. Scientia Verlag, 1965), to D. 50 c. 37.

11. Huguccio, *Summa*, Admont, *Stiftsbibliothek*, MS 7, to D. 50, c. 37, f. 71ra.

12. *Glossa Palatina*, Vatican City, *Biblioteca Apostolica Vaticana*, *Cod. palatini latini* MS. 658, to D. 50, c. 37, f. 13va; Huguccio, *Summa* to D. 50, c. 37, f. 71ra; Iohannes Teutonicus, *Glossa ordinaria*, Vatican City, *Biblioteca Apostolica Vaticana*, *Cod. palatini latini* MS 624, to D. 50 c. 37 to Clerico, f. 40rb.

13. E.g., *Glossa Palatina* to D. 50, c. 37, f. 13rb; Huguccio, *Summa* to D. 50, c. 37, f. 71ra; to D. 50, c. 44, f. 72va; to D. 50, c. 50, f. 73 ra; Iohannes Teutonicus, *Glossa ordinaria* to D. 50 c. 37 to Clerico, f. 40rb; Guido de Baisio (Archidiaconus), *Archidiaconus super Decretum* (1549), to D. 50, c. 37; to D. 50, c. 44 to casu. For other references, see Stephan Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX* (1935), 201 n. 1, 202 n. 1.

14. *Summa theologiae* II-II Q. 64, a. 8.

15. Soto, *De iustitia et iure* V.i.9.

16. Cajetan (Tomasso di Vio), *Commentaria to Thomas Aquinas, Summa theologiae* (1698) to II-II, Q. 64, a. 8; Lessius, *De iustitia et iure, ceterisque virtutibus cardinalis libri quatuor* (1628), lib. 2, cap. 9, dub. 15, nos. 104–5.



tantamount to saying he could not kill him.<sup>17</sup> Suppose someone steals a treasure and the owner dies of grief. Suppose someone kills Peter and malicious accusers see that Paul is punished for the crime.<sup>18</sup>

If the late scholastics had accepted the doctrine, it might not have died out. Grotius and Pufendorf, who borrowed many of their conclusions from the late scholastics, might have accepted it as well. It might have become part of modern civil law.

### c. Intent and Knowledge

#### English Law

**Edwin Peel and James Goudkamp, *Winfield and Jolowicz on Tort* (19th edn., 2014), 50–1**

“In the context of trespass to land it has been said that indifference to a risk that trespass will occur by animals in the defendant’s charge amounts to intention and it is thought that the same approach should be taken in all the trespass torts: if D throws his coffee dregs out the window of his office, knowing that others will be passing, that should be trespass if anyone is hit, whether the street is so crowded that it is a virtual certainty or it is comparatively unfrequented. To take another example, take the case of someone who places a bomb for political reasons; he may give a warning on the basis of which the emergency services may be expected to act and he may not ‘intend’ personal injury in the sense of desiring it but he can hardly deny that he appreciates the real risk of something going wrong. This is the state of mind referred to by the criminal law as ‘recklessness’, that is to say, the wrongdoer is conscious of the risk he is taking.”

#### Law in the United States

#### Restatement (Third) of Torts (Liability for Physical Harms)

##### § 1 INTENT

A person acts with the intent to produce a consequence if:

- (a). the person acts with the purpose of producing that consequence; or
- (b). the person acts knowing that the consequence is substantially certain to result.

#### **Garratt v. Dailey, 279 P.2d 1091 (Wash. 1955)**

“Brian Dailey (age five years, nine months) was visiting with Naomi Garratt, an adult and a sister of the plaintiff, Ruth Garratt, likewise an adult, in the backyard of the plaintiff’s home, on July 16, 1951. It is plaintiff’s contention that she came out into the backyard to talk with

17. Cajetan, *Commentaria to II-II*, Q. 64, a. 8; Lessius, *De iustitia et iure lib.* 2, cap. 9, dub. 15, nos. 104–105.

18. Lessius, *De iustitia et iure lib.* cap. 9, dub. 16, no. 113.

Naomi and that, as she started to sit down in a wood and canvas lawn chair, Brian deliberately pulled it out from under her . . .

The trial court's finding that Brian was a visitor in the Garratt backyard is supported by the evidence and negatives appellant's assertion that Brian was a trespasser and had no right to touch, move, or sit in any chair in that yard, and that contention will not receive further consideration . . .

We have here the conceded volitional act of Brian, i.e., the moving of a chair. Had the plaintiff proved to the satisfaction of the trial court that Brian moved the chair while she was in the act of sitting down, Brian's action would patently have been for the purpose or with the intent of causing the plaintiff's bodily contact with the ground, and she would be entitled to a judgment against him for the resulting damages . . .

After the trial court determined that the plaintiff had not established her theory of a battery (i.e., that Brian had pulled the chair out from under the plaintiff while she was in the act of sitting down), it then became concerned with whether a battery was established under the facts as it found them to be . . .

A battery would be established if, in addition to plaintiff's fall, it was proved that, when Brian moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been. If Brian had any of the intents which the trial court found, in the . . . portions of the findings of fact quoted above, that he did not have, he would of course have had the knowledge to which we have referred. The mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault and battery on her would not absolve him from liability if in fact he had such knowledge. *Mercer v. Corbin* (1889), 117 Ind. 450, 20 N.E. 132, 3 L.R.A. 221. Without such knowledge, there would be nothing wrongful about Brian's act in moving the chair, and, there being no wrongful act, there would be no liability.

While a finding that Brian had no such knowledge can be inferred from the findings made, we believe that before the plaintiff's action in such a case should be dismissed there should be no question but that the trial court had passed upon that issue; hence, the case should be remanded for clarification of the findings to specifically cover the question of Brian's knowledge, because intent could be inferred therefrom. If the court finds that he had such knowledge, the necessary intent will be established and the plaintiff will be entitled to recover, even though there was no purpose to injure or embarrass the plaintiff . . . If Brian did not have such knowledge, there was no wrongful act by him, and the basic premise of liability on the theory of a battery was not established."

### French Law

Reread François Terré, Philippe Simler, Yves Lequette, and François Chénéde, *Droit civil Les obligations* (12th edn. 2019), § 955, quoted above p. 446. The authors say that intentional fault . . . "exists when the author of the harm acted intentionally in order to cause a prejudice to another and probably when he acted in a manner that he must have known would injure another."

In support of that statement, the authors cite the Law of July 13, 1930 (L. 113–1 of the Insurance Code). The text of that law does not support their position. It says: “The insurer is never liable for loss or harm arising from a fault that is an intentional or fraudulent act despite any agreement to the contrary.”

### German Law

**Hein Kötz and Gerhard Wagner, *Deliktsrecht* (9th edn., 2001), 44**

“A person acts intentionally when he knows that his conduct will lead to an unlawful violation of another’s body, property or ‘similar right’ (*sonstiges Recht*) and who attains this result wilfully and consciously. The party need not have done so with a ‘direct intention’; he need not have the purpose of interfering with these rights of legal interests. Rather, it is enough if he recognized the possibility of such an interference, and proceeds to act despite this knowledge, taking into account that action may occur, although he may even hope that it does not (conditional intent). Thus, one who flees from an accident and runs over a policeman standing in his way has intentionally injured him even if he hopes the policeman can reach safety by a sudden leap. It is enough if the person fleeing took account of the injury to the policeman in the event that it should occur as a consequence of his act which is certainly regrettable but which is subordinated to his purpose of fleeing.”

### Chinese Law

**Wang Shengming, *Interpretations on the Tort Liability Law of the PRC* (2nd edn.) (Official Interpretations by National People’s Congress, 2nd edn., Peking, 2013), 45**

“[Intention means] the mental state of the actor who knows that his act will give rise to the harmful consequence, yet was willing to let it happen or was insensitive to the consequence.”

## 3. Negligence

### a. The Meaning of Negligence

There have been three ways of explaining negligence. One is by giving examples. The Romans gave dozens of them. For example, a person who cuts off the branch of a tree over the public way without calling out was negligent.<sup>1</sup> So was someone who burnt stubble on a windy day when his fire might get out of control,<sup>2</sup> or who shaved a customer near a sports field where a stray ball might strike the hand that held the razor.<sup>3</sup>

1. Dig. 9.2.31.

2. Dig. 9.2.31.

3. Dig. 9.2.11.pr.

Another way to describe negligence is the sort of conduct in which an idealized person, a “reasonable person,” does not engage. In Roman law, this person was the *bonus paterfamilias*, the good head of a household.

A third way is to say that the negligent person has not properly weighed the pros and cons of his action. Many people now give this approach an economic interpretation. But a version of it was around before modern economics. When Aristotelian philosophy was in favor, the negligent person was said to lack the virtue of “prudence.” “Prudence” was right reason about things to be done. The prudent person would balance the good against the evil that might arise from an action. Suppose a nurse put a child in bed with her at night to keep him from crying and rolled over on the child in the night, suffocating him. Here is a sixteenth-century description of how to decide whether the nurse was negligent:

[If] the bed is large and there is nothing else near it, the nurse is always accustomed to find herself in the same place and position in which she put herself to begin sleeping, and the implacability of the infant required it, she seems to be excused, because it is not rational when these things concur to fear the risk.<sup>4</sup>

## b. The Weighing of Consequences

### i. An English Description

**Edwin Peel and James Goudkamp, *Winfield and Jolowicz on Tort* (19th edn., 2014), 151**

“If the risk of injury that materialized is reasonably foreseeable, the next question to address is how the reasonable person would have responded to it. This enquiry is sometimes referred to as the ‘negligence calculus’. It involves weighing four factors: (1) the size of the risk; (2) the gravity of the risk (i.e. how serious would the likely harm be if the risk materialized); (3) the utility of the defendant’s conduct; and (4) the cost of taking precautions. Describing this exercise as a calculus can be criticized on the ground that it suggests that it involves a mechanical or scientific process. It is certainly true that the process involves the application of common sense and that there is no formula that can be applied to determine automatically the outcome in particular cases.”

### ii. Some American Descriptions

**United States v. Carroll Towing Co., 159 F.2d 169 (2nd Cir. 1947)**

The defendant’s tug boat was moving a line of barges including the *Anna C*, owned by the Connors Company. The *Anna C* broke away from the

4. Cajetan, *Commentaria to Thomas Aquinas, Summa theologiae* (1698), post Q. 64, a. 8.

line of barges being moved and was carried by the wind and tide into a tanker, whose propellor broke through the *Anna C*'s hull, after which the barge started to leak. Had a bargee been on board, the leak might have been discovered earlier, and the barge might have been saved. As to whether it was contributory negligence not to have a bargee on board, Learned Hand said: "Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her, the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called  $P$ ; the injury  $L$ ; and the burden,  $B$ ; liability depends upon whether  $B$  is less than  $L$  multiplied by  $P$ : i.e., whether  $B$  [is less than]  $PL$ . Applied to the situation at bar, the likelihood that a barge will break from her fasts and the damage she will do, vary with the place and time; for example, if a storm threatens, the danger is greater; so it is, if she is in a crowded harbor where moored barges are constantly being shifted about. On the other hand, the barge must not be the bargee's prison, even though he lives aboard; he must go ashore at times. We need not say whether, even in such crowded waters as New York Harbor a bargee must be aboard at night at all; it may be that the custom is otherwise, as Ward, J., supposed in *The Kathryn B. Guinan*, 176 F.2d 301; and that, if so, the situation is one where custom should control. We leave that question open; but we hold that it is not in all cases a sufficient answer to a bargee's absence without excuse, during working hours, that he has properly made fast his barge to a pier, when he leaves her. In the case at bar the bargee left at five o'clock in the afternoon of January 3rd, and the flotilla broke away at about two o'clock in the afternoon of the following day, twenty-one hours afterwards. The bargee had been away all the time, and we hold that his fabricated story was affirmative evidence that he had no excuse for his absence. At the locus in quo – especially during the short January days and in the full tide of war activity – barges were being constantly 'drilled' in and out. Certainly it was not beyond reasonable expectation, that with the inevitable haste and bustle, the work might not be done with adequate care. In such circumstances we hold – and it is all that we do hold – that it was a fair requirement that the Connors Company should have a bargee aboard (unless he had some excuse for his absence), during the working hours of daylight."

**Richard Posner, "A Theory of Negligence," *J. Legal Stud.* 1 (1972), 29, 32–3**

"Hand was adumbrating, perhaps unwittingly, an economic meaning of negligence. Discounting (multiplying) the cost of an accident if it occurs by the probability of occurrence yields a measure of the economic benefit to be anticipated from incurring the costs necessary to prevent the accident. The cost of prevention is what Hand meant by the burden of taking precautions against the accident. It may be the cost of installing safety equipment or otherwise making the activity

safer, or the benefit forgone by curtailing or eliminating the activity. If the cost of safety measures or of curtailment – whichever cost is lower – exceeds the benefit in accident avoidance to be gained by incurring that cost, society would be better off, in economic terms, to forgo accident prevention. A rule making the enterprise liable for the accidents that occur in such cases cannot be justified on the ground that it will induce the enterprise to increase the safety of its operations. When the cost of accidents is less than the cost of prevention, a rational profit-maximizing enterprise will pay tort judgments to the accident victims rather than incur the larger cost of avoiding liability. Furthermore, overall economic value or welfare would be diminished rather than increased by incurring a higher accident-prevention cost in order to avoid a lower accident cost. If, on the other hand, the benefits in accident avoidance exceed the costs of prevention, society is better off if those costs are incurred and the accident averted, and so in this case the enterprise is made liable, in the expectation that self-interest will lead it to adopt the precautions in order to avoid a greater cost in tort judgments.”

### iii. Some French Descriptions

Read pages 648–649, below.

### iv. Some German Descriptions

While the French rarely discuss the Hand formula, the Germans sometimes do. The passages that follow are excerpts from leading textbooks. The first is by a jurist who is more favorable to the formula; the second is by one who is less so.

#### **Hein Kötz and Gerhard Wagner, *Deliktsrecht* (9th edn., 2001), 45**

“To determine if ‘the care ordinarily required’ has been used in a particular situation, what matters is what kind of harm is threatened in the situation, and with what probability its occurrence is to be feared; it also matters what action or omission could avoid the harm, and what disadvantages, costs and burdens were entailed for the person concerned in the taking of the measures to avoid the harm. The more serious the harm and the greater the probability of its occurrence the further one must go to answer the question, what conduct is expected of a ‘careful person’ in the interest of avoiding the harm.

Take the case in which someone’s health is damaged because a poisoned cutlet (*Schnitzel*) was put before him in an inn. If it is established here that the innkeeper kept rat poison in an unmarked jelly jar in the kitchen, and the cook, in a hurry, mistook it for curry powder and put it on the cutlet, the question of whether the innkeeper acted negligently comes down to the following considerations. The danger threatening the guests through accidental use of the rat poison



was great. Taking into account the way and the place that the rat poison was stored, the danger of such a harm occurring was serious. Among the measures that could be considered to prevent the harm are taking the poison out of the kitchen, storing it in the kitchen in a locked container, and possibly marking the container in an appropriate way. It was possible for the innkeeper to take these measures and to do so would not have burdened him to an extent worth mentioning. Result: the innkeeper is to be blamed for negligence ... .”

**Karl Larenz and Claus-Wilhelm Canaris, *Lehrbuch des Schuldrechts II/2* (13th edn., 1994), 413–14**

“b) When a person has a responsibility [for preventing harm] it does not automatically follow that he has a duty to take measures to avoid the danger. Whether he does must be determined in the individual case on the basis of a number of criteria. The most important, even in the area of daily experience with risks, are the degree of *danger* and the extent and nature of the (possible) *harm* on the one hand, and the *burden* required to avoid its occurrence, on the other. The degree of danger depends essentially on the probability that it will occur. This in principle (only) gives rise to liability when ‘the possibility arises which is foreseeable by a judgment based on experience, that the legal interests of another person may be injured,’ supposing that the danger is concrete although it need not be great. As to the extent of the harm, not only material losses but also immaterial injuries such as occur with bodily harm and death are obviously of considerable significance. Also the level of the legal interest threatened plays a role so that essentially it matters to the importance of a harm whether injury to life and limb is to be feared or only injury to property. The burden of prevention includes not only financial costs but also loss of time and the engagement of one’s ability to work of the (potential) violator of a duty. As these parameters and their *exact* correct weighing against each other virtually never permit an exact quantification (see h) below) they do not permit one to arrive at a clear solution but only at comparative maxims ... : the greater the danger, the worse the harm threatened, and the lower the burden of prevention, the sooner a duty to avoid the danger will arise.

... h) Finally, in this connection, a short word is in order about ‘*economic analysis of law*’ even though only brief and superficial remarks can be made in the space available here. First, it must be stressed that the relevance of an economic standpoint to the development of duties of ordinary care is indisputable and for a long time has been recognized as obvious (see b), above). To have sharpened the awareness of the importance of this aspect is certainly a substantial service of the followers of this doctrine. Moreover, their arguments may be strong enough to influence the solution of a problem even as to its practical outcome.

On the whole, however, and in my opinion, one cannot succeed with the help of the teaching of ‘economic analysis’ in formulating the relevant criteria any more precisely than one could without using them, all the

more because the extent of the burden of using difficult terminology is often out of proportion to the gain in cogent argumentation. Moreover, nearly always ‘economic analysis’ does not permit an accurate quantification of parameters such as the probability of harm, the size of the possible harm, and the extent of the burden of prevention (of both sides). On the contrary, in this respect, it can awaken considerations that are illusory. Finally, the instruments of economic analysis seem wholly inadequate insofar as non-material values are concerned, particularly in the area of protecting life and limb as these elude even a hypothetical model-like quantification. To that extent, one still cannot get around the famous saying of Kant that a person has a ‘value’ on account of which he is ‘great beyond all price.’ This sketch will show why no reference has been made to ‘economic analysis’ in this textbook . . . .”

## **v. A Chinese Description**

**Wang Shengming, *Interpretations on the Tort Liability Law of the PRC* (2nd edn.) (Official Interpretations by National People’s Congress (2nd edn., Peking, 2013), 45**

“[Negligence means] the actor should have foreseen the negative consequence, but failed to foresee it due to his neglect or foresaw it with the slack mindset and the belief that consequence could be avoided.”

## **c. The Reasonable Person**

### **i. The General Principle**

**Blyth v. Birmingham Water Works [1856] 11 Ex. 781**

Alderson, B. “Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”

## **Restatement (Second) of Torts**

### **§ 283 CONDUCT OF A REASONABLE MAN: THE STANDARD**

Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.

**François Terré, Philippe Simler, Yves Lequette, and François Chénéde, *Droit civil Les obligations* (12th edn., 2019), § 957**

“Since the affirmation of responsibility implies a comparison between that which was and, ultimately, that which should have been, in matters regarding the faults of imprudence or negligence, the courts refer to an abstract model which represents the good family father (*bon père de famille*), that is to say, the reasonable man placed in the same situation.”

## German Civil Code

### § 276(1) SENTENCE 2 RESPONSIBILITY OF THE DEBTOR

A person acts negligently who fails to use the care ordinarily required.

### Hein Kötz and Gerhard Wagner, *Deliktsrecht* (9th edn., 2001), 44

“By the definition of § 276(1), 2nd sentence, a person acts negligently who fails to use ‘the care ordinarily required.’ That means chiefly that the person causing harm did not act as circumspectly, carefully and attentively in the concrete situation in which he found himself as was required by the state of the circumstances. Consequently, the actual conduct of the person whose liability is in question must be compared with that which would have been displayed by a careful person of ordinary circumspection and prudence to avoid an unreasonably large risk of harm to another. If there is a difference because the conduct of the defendant does not meet this standard of care, then there is negligence.”

## ii. Children and the Mentally Ill English Law

### Gough v. Thorne, [1966] 3 All E.R. 398 (C.A.)

“A 13½ year old girl (the plaintiff) was waiting on the pavement, with her two brothers, to cross a main road in London at a corner where there were bollards and a refuge in the middle of the road. An approaching lorry stopped between the plaintiff and the bollards, about five feet from the bollards, and the driver held out his right hand to warn traffic coming along to stop and with his left hand beckoned the plaintiff and her brothers to cross. They did so, but when they had just passed the front of the lorry the plaintiff was struck and injured by a bubble-car which was being driven at excessive speed, the driver of which failed to notice the lorry driver’s outstretched hand and drove between the lorry and the bollards. In an action by the plaintiff for damages the trial judge found that the bubble-car driver, the defendant, was negligent, but also found that the plaintiff was negligent in advancing past the lorry into the open road without pausing to see whether there was any traffic coming from her right, and assessed the degree of her contributory negligence at one-third.”

Lord Denning, M.R. “I am afraid that I cannot agree with the judge. A very young child cannot be guilty of contributory negligence. An older child may be; but it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as reasonably to be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame should be attached to him or her. A child has not the road sense or the experience of his or her elders. He or she is not to be found guilty unless he or she is blameworthy.

In this particular case I have no doubt that there was no blameworthiness to be attributed to the plaintiff at all. Here she was with her elder brother crossing a road. They had been beckoned on by the lorry driver. What more could you expect the child to do than to cross in pursuance of the beckoning? It is said by the judge that she ought to have leant forward and looked to see

whether anything was coming. That indeed might be reasonably expected of a grown-up person with a fully developed road sense, but not of a child of 13½.”

**Note.** No English court has yet decided whether the same rule applies to negligence rather than merely to contributory negligence. Nor has an English court passed on the liability of the insane for negligence. Here are two cases from Canada.

**Buckley and Toronto Transportation Com’n v. Smith Transport Ltd., [1946] 4 D.L.R. 721 [1946] (British Columbia Supreme Court)**

“The driver of a transport truck caused a collision with a street car by his operation of the truck. He suffered from a delusion that his vehicle was under the remote electrical control of his employer from its head office so that he could neither control its speed nor stop it. It was found that he was insane immediately after the collision and there was evidence indicating that the delusion was operative before the collision. He died in a mental hospital from general paresis within a month following the accident.”

The court held that he was not negligent. “Having regard to all the evidence, I have reached the conclusion that at the time of the collision Taylor’s mind was so ravaged by disease that it should be held, as a matter of reasonable inference, that he did not understand the duty which rested upon him to take care, and further that if it could be said that he did understand and appreciate that duty, the particular delusion prevented him from discharging it. Therefore, no liability for the damages which he caused could attach to him.”

**Attorney-General of Canada et al. v. Connolly, [1989] 64 D.L.R. 4th 84 (British Columbia Supreme Court)**

“The defendant, who was suffering from a serious mental disorder, caused injury to a police officer, who had asked for his driver’s licence, by pinning the officer’s arm inside the defendant’s car and driving away. The medical evidence was that the defendant knew that a person was standing by the car with his arm inside it, but that he did not know that what he was doing was wrong, or that it would cause harm.”

Paris, J. “Actionable negligence involves foreseeability of harm of the kind, at least in general, that in fact results from the negligent act. Persons with severe mental illnesses of the kind from which the defendant in this case suffers, have their capacity for such foresight severely impaired. If an act entraining liability in negligence must be accompanied by foresight of harm in the above sense, then it is necessary to consider whether because of mental illness the person might be incapable of such foresight. If he is not capable of foreseeing that his act involves a significant risk of harm to others then one can say that there was not sufficient awareness or consciousness of the nature of his act to make it a true voluntarily negligent act.

This analysis respects the authority of the Buckley case and recognizes the psychological reality that an act of battery requires less mental capacity than an actionably negligent act. It does so, however, without importing into the law of tort the full criminal defence of insanity which one could misinterpret the Buckley case as having done.

Admittedly, it is a departure from the objective test usually applied in a claim for negligence. The foreseeability of the reasonable person is normally the measure of liability in an action in negligence. But negligence, perhaps more than most other torts, is about fault and mental state. This approach, I believe, is more in line with the evolution of the law away from the early strict common law rule which afforded no relief in tort to a defendant who suffered from severe mental illness." [The court held, however, that the defendant had committed battery even if he did not understand that his act was wrongful.]

### **Law in the United States**

#### **Restatement (Second) of Torts**

##### **§ 283A CHILDREN**

If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances.

**Comment c.** Child engaging in adult activity. An exception to the rule stated in this Section may arise where the child engages in an activity which is normally undertaken only by adults, and for which adult qualifications are required. As in the case of one entering upon a professional activity which requires special skill (see § 299 A), he may be held to the standard of adult skill, knowledge, and competence, and no allowance may be made for his immaturity. Thus, for example, if a boy of fourteen were to attempt to fly an airplane, his age and inexperience would not excuse him from liability for flying it in a negligent manner. The same may be true where the child drives an automobile. In this connection licensing statutes, and the examinations given to drivers, may be important in determining the qualifications required; but even if the child succeeds in obtaining a license he may thereafter be required to meet the standard established primarily for adults.

##### **§ 283B MENTAL DEFICIENCY**

Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances.

### **German Law**

#### **German Civil Code**

##### **§ 827 EXCLUSION AND DIMINISHING OF RESPONSIBILITY**

A person who causes damage to another person when the former is unconscious or when he is suffering from a mental disturbance preventing the free exercise of his will, is not responsible for the damage. If he has brought himself into a temporary condition of this kind by alcoholic drinks or similar means, he is responsible for any damage which he in this condition unlawfully causes in the same manner as if negligence were imputable to him; the responsibility does not arise if he came into this condition without fault.

## § 828 MINORS

A person who has not completed his seventh year of age is not responsible for any damage that he causes to another.

A person who has completed his seventh but not his eighteenth year of age is not responsible for any damage that he causes to another, if he, at the time of committing the damaging act, did not have the understanding required to realize his responsibility. The same applies to a deaf mute.

## § 829 DUTY OF COMPENSATION ON THE GROUNDS OF EQUITY

A person who in one of the cases specified in §§ 823 to 826, is not responsible, by virtue of §§ 827, 828, for damage caused by him, shall, nevertheless, where compensation cannot be obtained from a third party charged with the duty of supervision, compensate for the damage to the extent reasonable under the circumstances, in particular where, in view of the circumstances of the parties, fairness requires that the damage be made good, and he is not deprived of the means that he needs for his own maintenance suitable to his station in life and for the fulfilment of the obligations imposed upon him by law to furnish maintenance to others.

**French Law****Law of January 3, 1968, now French Civil Code**

## ARTICLE 414–3

One who causes harm to another even if he is under the domination of a mental disturbance is nonetheless liable to make compensation.

**Cour de cassation, Assemblée plénière, May 9, 1984 (4th case), D.S. 1984.J.529**

Fatiha Derguini, then aged five, was struck and fatally injured by a car driven by Tidu in an area where signs warned drivers to watch for pedestrians. The *Cour d'appel* of Nancy held him guilty of involuntary homicide and also divided the damages for the accident to reflect the partial responsibility of the victim. [France, like other continental legal systems, has a system of comparative negligence in which the victim's damages are reduced in proportion to the victim's own fault.] The victim's parents argued that the *Cour d'appel* should not have done so. They pointed out that the *Cour d'appel* of Metz, which had heard the case before it was remanded to the *Cour d'appel* of Nancy, had found that "the victim, age five years and nine months ... was much too young to appreciate the consequences of her acts." Her parents argued that "the absence of discernment excluded all responsibility on the part of the victim." The *Cour de cassation* upheld the decision below. It said that "after having found that M. Tidu was at fault for a lapse of attention and also that the young Fatiha leaping into the street, had suddenly begun to cross it despite the imminent danger of M. Tidu's oncoming car and made a half turn to get back to the sidewalk, the decision declared that this untimely movement made any maneuver to rescue her impossible for the motorist." Consequently, "the *Cour d'appel* which was not bound to



investigate whether the minor was capable of discerning the consequences of her actions, could, without contradicting itself, find on the basis of art. 1382 that the victim had committed a fault which in concurrence with that of M. Tidu had caused the harm in a proportion which it had the sovereign authority to determine . . . .”

**Note.** In a companion case, decided the same day, the *Assemblée plénière* of the *Cour de cassation* reached the same result when a thirteen-year-old boy was electrocuted as a result of defective work in an electrical installation in his parents’ farm. The *Cour d’appel* had reduced the damages in proportion to the victim’s fault in having screwed in a bulb without switching off the electric current. The *Cour de cassation* said that the *Cour d’appel* “was not bound to investigate whether the minor had the capacity to discern the consequences of the faulty act which he committed.”

#### **d. The Duty to Act**

Civil and common lawyers agree that one has a duty to refrain from hurting others, and that a person who fails to use due care to discharge this duty is liable for negligence. But does one have a duty to help others when they are in danger?

#### **i. The General Principle** **English Law**

##### **Stovin v. Wise and Norfolk County Council, [1996] AC 923 (H.L.)**

“The plaintiff [Stovin] was riding a motor cycle along a road in December 1988 when he collided with a motor vehicle being driven by the defendant [Wise] out of a junction on the plaintiff’s left across his path. The plaintiff was seriously injured in the collision. Although the particular junction was not a busy one, it was known by the county council, as the highway authority, to be dangerous because the view of road users turning out of the junction into the major road was restricted by a bank on adjoining land. Accidents in similar situation had occurred at the road junction on at least three previous occasions. In January 1988, after a site meeting at the junction, a divisional surveyor employed by the council accepted that a visibility problem existed and recommended removal of part of the bank. The council agreed that the work would be carried out providing the owner of the land, on which the bank was situated, agreed. No response to the council’s proposal was forthcoming from the owner of the land before the time of the plaintiffs accident notwithstanding a further site meeting at which the representatives of the landowner and council were present.”

Lord Hoffmann. “The judge [below] made no express mention of the fact that the complaint against the council was not about anything which it had done to make the highway dangerous but about its omission to make it safer . . .

There are sound reasons why omissions require different treatment from positive conduct. It is one thing for the law to say that a person who undertakes some activity shall take reasonable care not to cause damage to

others. It is another thing for the law to require that a person who is doing nothing in particular shall take steps to prevent another from suffering harm from the acts of third parties (like Mrs Wise) or natural causes. One can put the matter in political, moral or economic terms. In political terms it is less of an invasion of an individual's freedom for the law to require him to consider the safety of others in his actions than to impose upon him a duty to rescue or protect. A moral version of this point may be called the 'why pick on me?' argument. A duty to prevent harm to others or to render assistance to a person in danger or distress may apply to a large and indeterminate class of people who happen to be able to do something. Why should one be held liable rather than another? In economic terms, the efficient allocation of resources usually requires an activity should bear its own costs. If it benefits from being able to impose some of its costs on other people (what economists call 'externalities,') the market is distorted because the activity appears cheaper than it really is. So liability to pay compensation for loss caused by negligent conduct acts as a deterrent against increasing the cost of the activity to the community and reduces externalities. But there is no similar justification for requiring a person who is not doing anything to spend money on behalf of someone else. Except in special cases (such as marine salvage) English law does not reward someone who voluntarily confers a benefit on another. So there must be some special reason why he should have to put his hand in his pocket ...

To hold the defendant liable for an act, rather than an omission, it is therefore necessary to be able to say, according to common sense principles of causation, that the damage was caused by something which the defendant did. If I am driving at 50 miles an hour and fail to apply the brakes, the motorist with whom I collide can plausibly say that the damage was caused by my driving into him at 50 miles an hour. But Mr Stovin's injuries were not caused by the negotiations between the council and British Rail or anything else which the council did. So far as the council was held responsible, it was because it had done nothing to improve the visibility at the junction."

On the question of whether the council was under a statutory duty of care, Lord Hoffmann said: "It is clear, however, that this public law duty cannot in itself give rise to a duty of care. A public body almost always has a duty in public law to consider whether it should exercise its powers, but that does not mean that it necessarily owes a duty of care which may require that the power should actually be exercised ...

[Even if] it would be irrational (in the public law meaning of that word) for the public authority not to exercise its power, it does not follow that the law should superimpose a common law duty of care. This can be seen if one looks at cases in which a public authority has been under a statutory or common law duty to provide a service or other benefit for the public or a section of the public. In such cases there is no discretion but the courts have nevertheless not been willing to hold that a member of the public who has suffered loss because the service was not provided to him should necessarily have a cause of action, either for breach of statutory duty or for negligence at common law."

## Law in the United States

### Restatement (Second) of Torts

#### § 314 DUTY TO ACT FOR PROTECTION OF OTHERS

The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.

*Illustration:* A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from so doing by a word or touch without delaying his own progress. A does not do so, and B is run over and hurt. A is under no duty to prevent B from stepping into the street, and is not liable to B.

**Dan B. Dobbs, Paul T. Hayden, and Ellen M. Bublick, *Hornbook on Torts* (2nd edn., 2016)**

*General Rule:* Absent special relationships or particular circumstances or actions, a defendant is not liable in tort for a pure failure to act for plaintiff's benefit.

[In the Illustration to Restatement (Second) of Torts § 314] [t]he general rule applies to relieve defendant of any liability. The cases are seldom so dramatic but they accept and apply the rule.<sup>[4]</sup>

**Note.** Here are the five cases cited in note 4, above. Consider whether they are like the Restatement illustration. Consider whether the court would have reached the same result whether or not there is a duty to rescue.

### **Yania v. Bigan, 155 A.2d 343 (Pa. 1959)**

When Yania was visiting Bigan to discuss business Bigan jumped into a cut in a worked-out strip mine containing eight to ten feet of water and drowned. The complaint alleged that Bigan had caused him to jump "by urging, enticing, taunting and inveighing [him] to jump into the water, which [Bigan] knew or ought to have known . . . was dangerous to the life of anyone who would jump therein." It alleged Bigan was negligent for having done so, and also, *inter alia*, for "failing to go to Yania's rescue after he had jumped in the water." The court said: "The mere fact that Bigan saw Yania in a position of peril in the water imposed upon him no legal, although a moral, obligation or duty to go to his rescue unless Bigan was legally responsible, in whole or in part, for placing Yania in the perilous position: Restatement, Torts, § 314. Cf. Restatement, Torts, § 322. The language of this Court in *Brown v. French*, 104 Pa. 604, 607, 608, is apt: 'If it appeared that the deceased, by his own carelessness, contributed in any degree to the accident which caused the loss of his life, the defendants ought not to have been held to answer for the consequences resulting from that accident.'"

**Note.** At the time Yania was decided, the plaintiff's negligence would have been an absolute bar to an action. Today, American courts, like continental courts, apply a rule of comparative negligence. They consider

the gravity of the fault of the plaintiff and the defendant and apportion the damages accordingly.

**Rocha v. Faltys, 69 S.W. 3d 315 (Tex. App. 2002)**

“This case arises out of a tragic accident that occurred on April 26, 1998. At the time of the accident, George Rocha Jr. was a twenty-one-year-old junior at Southwestern University in Georgetown and a member of Pi Kappa Alpha fraternity. On April 25, 1998, George and his friend Faltys (a former suitemate who was also a member of the fraternity) attended a crawfish boil at the fraternity house. George consumed some beer at the crawfish boil, which officially ended at 6:00 p.m.; an informal open house followed for some period of time. Around 2:45 a.m. on April 26, George and Faltys, accompanied by three co-eds from Southwestern, went to a local swimming spot on the San Gabriel River called the ‘Blue Hole.’ At the Blue Hole, Faltys and George climbed to the top of some cliffs that overlook the river. Faltys dove into the river from the cliffs and then, according to appellants, encouraged George to do the same. George, who was unable to swim, also jumped from the cliffs but began floundering as soon as he hit the water. Despite the efforts of Faltys and other students to save George, he drowned.

Faltys’s act of taking George to the top of the cliffs, in and of itself, does not give rise to a legal duty. Simply taking George, an adult man, to the location where George could choose to engage in an allegedly dangerous activity does not constitute negligent creation of a dangerous situation. The fact that George was intoxicated does not affect this analysis. It has been long-recognized at common law that an individual who chooses to consume alcohol maintains the ultimate power over his situation and thus the obligation to control his own behavior. To impose a legal duty on Faltys because George had consumed alcohol would be contrary to this principle.

The Rochas also allege, however, that Faltys negligently created a dangerous situation by encouraging George to jump from the cliff when he knew George could not swim. None of the parties have identified any Texas case suggesting that an adult encouraging another adult to engage in a dangerous activity can give rise to a legal duty.”

**Long v. Patterson, 22 So.2d 490 (Miss. 1945)**

“About nine o’clock on the evening of May 25, 1944, appellees’ decedent, John Patterson, was driving a farm tractor northward on paved highway No. 45 in Prentiss county. The tractor carried no lights. Riding on the rear fender of the tractor was a boy named Cecil Jones, fourteen years of age. The declaration alleged that Jones ‘agreed and promised the said John Patterson . . . that he would exercise all diligence and care to give Patterson timely notice of all approaching traffic, and plaintiffs’ said decedent relied upon the promise and undertaking of said defendant (Cecil Jones) in the course of travel by tractor on said highway.’ The declaration avers that a cattle truck driven by the defendant Martin approached from the south at a reckless and dangerous rate of speed, and that although

Martin saw the tractor in the road ahead of him, he disregarded it nevertheless and ran into and upon the tractor with the result that appellees' decedent, the driver of the tractor, was killed; that Jones on the tractor who had agreed to give warning failed to do so until it was too late to turn the tractor off the road, which could have been done, avoiding injury, had Jones given warning of the approach of the cattle truck in time.

It is admitted that Martin was the servant of the other defendants, Long and Spicer, and that at the time he was engaged in the business of his employers and within the scope of his employment . . .

- (1). Is there a duty imposed by law upon any person to warn another of an approaching or impending danger to the latter, when the person sought to be charged had and has nothing to do with putting into operation, or with the continuance in operation of, the dangerous agency which approaches?

Whatever we might think of this as a moral proposition, it is a question to which the settled law gives a negative answer . . .

- (2). May an infant be bound by his consent given in such case? Here, too, the settled law answers in the negative."

### **Cilley v. Lane, 385 A.2d 418 (Me. 2009)**

"In 2003, Jennifer Lane and Joshua Cilley began a romantic relationship that continued over the next year and one-half. Although the two had discussed marriage, they had also broken up and reunited several times during those months. On January 30, 2005, Lane told Cilley that they needed to take some time off from their relationship, but that they would still be friends.

During the late afternoon of the next day, January 31, 2005, . . . Cilley arrived [at Lane's trailer where she lived] and entered. Lane told him to leave; Cilley refused and initially blocked Lane's attempt to exit the trailer. The parties dispute what happened next. Lane claims that she tried to use her cell phone to call a neighbor for help with removing Cilley from her home. Lane also claims that, while she was on the phone, Cilley went out to his car, and returned carrying a small caliber rifle. He then grabbed her cell phone, threw it against the wall, and broke it. The Estate claims that the rifle was already inside the trailer. Whether Cilley brought the rifle inside, or grabbed it from inside Lane's trailer, it is undisputed what happened next.

Lane walked out of her trailer. As she was doing so, she heard a loud pop, which she later described as sounding like a firecracker. Lane looked back, and saw Cilley fall to the floor. She then heard him say that 'it was an accident' and 'it was not supposed to happen.' Lane, who did not see any blood, did not investigate or attempt to assess whether Cilley was injured. She returned to her friend's trailer and told her two friends that Cilley had pretended to shoot himself inside her trailer.

Lane's friends looked out the window and saw Cilley lying on the steps to Lane's trailer, halfway outside the door. They went over to Cilley, and

noted that he was mumbling, 'It was an accident.' One of the friends picked up the gun lying near Cilley, and asked him if he had been shot. She noted that Cilley was turning white, and had difficulty breathing. The other friend went to a neighboring trailer and called 911.

Cilley could not be resuscitated at the hospital. He died as a result of a single gunshot wound to his abdomen from a .22 caliber bullet. According to the physician who treated him, Cilley could have been resuscitated if he had arrived at the hospital five to ten minutes earlier.

Because Cilley was a trespasser at the time of the incident, Lane's only duty to him was to refrain from wanton, willful, or reckless behavior . . . 'To entitle a trespasser to recover for an injury, he must do more than show negligence. It must appear that a wanton or intentional injury was inflicted on him.' *Foley v. H.F. Farnham Co.*, 135 Me. 29, 35, 188 A. 708, 712 (1936). Lane's failure to contact emergency assistance for Cilley immediately after she heard the pop does not rise to the level of wanton, willful, or reckless behavior because Lane did not create the danger to Cilley, nor commit any act that led to his initial injury.

...

With its second argument, the Estate urges us to recognize a new common law duty: the duty to seek affirmative emergency assistance through reasonable means . . . The duty proposed by the Estate stands in direct opposition to the principle that a person does not have an affirmative duty to aid or warn another person in peril."

### **Krieg v. Massey, 781 P.2d 277 (Mont. 1989)**

"The plaintiff, Leslie D. Krieg, brought this wrongful death action founded on negligence for failure of defendants to prevent the suicide of his 77 year-old uncle, Arthur Leslie Van Hoose.

Masseys are the owners and operators of the Massey Apartments in Billings, Montana. When Mr. Van Hoose moved into the Massey Apartments, Mr. Massey introduced Mr. Van Hoose to the apartment manager, Mrs. Young, an elderly lady in her seventies.

The next day, Mr. Van Hoose told Mrs. Young he was having leg and stomach pain. Mrs. Young offered the use of her phone to Mr. Van Hoose so that he could call a doctor. He declined. She then offered to take him to the hospital to see a doctor. He accepted this offer, however, Mrs. Young told him she was expecting her daughter and would have to wait until her daughter arrived.

Later, when Mrs. Young was walking past Mr. Van Hoose's room, his door was open and she noticed he was walking around the room holding a pistol. Mrs. Young told him not to point the gun at her. He responded with, 'Guns take care of all problems.' Mrs. Young stated, 'It doesn't take care of problems, it causes problems.' She then took the pistol from Mr. Van Hoose with the intention of taking it to her apartment. When Mr. Van Hoose protested, she obtained a chair from the kitchen, climbed up on the chair and put the pistol on the top of a closet, thinking he would leave it alone.



Mr. Van Hoose appeared calmer and Mrs. Young repeated that she would take him to the doctor, then left. She did nothing else about the gun incident.

Approximately an hour later, Mrs. Young heard a loud 'thud.' She was not concerned about the noise until the thought occurred to her that Mr. Van Hoose may have climbed up on the chair to get the pistol, and fallen off. She then went back to his apartment and discovered he had killed himself with the pistol.

The general rule, as relied upon by the District Court, in the area of civil liability for suicide is that '[n]egligence actions for the suicide of another will generally not lie since the act or suicide is considered a deliberate intervening act exonerating the defendant from legal responsibility ...' 41 ALR 4th, 353. Prosser and Keeton on Torts § 44 at 280–81 (4th ed. 1971); *McPeake v. Cannon Esquire, P.C.* (1989), 381 Pa.Super. 227, 553 A.2d 439; *McLaughlin v. Sullivan* (1983), 123 N.H. 335, 461 A.2d 123. We expressly adopt this rule.

...

The District Court, however, went on to determine that the suicide in this case was not foreseeable. Mrs. Young testified that she did not think Mr. Van Hoose should have the gun, but that she did not think he was planning on killing himself. When asked why she put the gun on top of the closet, she said, 'I figured he'd leave it alone.' She then returned to her own apartment. Plaintiff failed to present any evidence to show that Mr. Van Hoose's suicidal tendencies had been communicated to Mrs. Young. Further, nothing indicates that she had any special training to foresee that Mr. Van Hoose intended suicide. We conclude that no genuine issue of material fact existed regarding foreseeability."

**Note.** If there is no duty to rescue, were the following cases correctly decided?

**Rockhill v. Pollard, 485 P.2d 28 (Ore. 1971)**

The plaintiffs, a mother-in-law and her 10 month old daughter, were seriously injured in an automobile accident. Both had cuts and bruises, and the daughter was pale and seemed lifeless. They were taken to the office of defendant, a medical doctor, by a passing motorist. He did not examine the women and only briefly examined the baby. When the baby vomited, he said it was due to overeating. He ordered the women to wait outside in the freezing rain until plaintiff's husband came for them. He took them to the hospital where the baby was operated on for a depressed skull fracture. Held: defendant is liable for intentional infliction of emotional distress.

**Tarasoff v. Regents of the University of California, 551 P.2d 334 (Cal. 1970)**

Prosenjit Poddar told Dr. Lawrence Moore, a psychologist employed at Cowell Memorial Hospital at the University of California at Berkeley, that he intended to kill Tatiana Tarasoff. At Moore's request, the campus police

briefly detained Poddar, but Moore's superior, Dr. Harvey Powelson, ordered that he be released. Two months later, Poddar killed her. No one had tried to warn her. The court held that "plaintiffs can state a cause of action against defendant therapists for negligent failure to warn." It cited *Dillon v. Legg* (above pp. 430–431) for the propositions that to say there is no duty "begs the essential question" and that duty is "only the expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection."

**Soldano v. O'Daniels, 190 Cal. Rptr. 310 (Cal. App. 1983)**

Defendant owned the Circle Inn. The plaintiff alleged that a patron of Happy Jack's saloon across the street came in and told the bartender of the Circle Inn that a man had been threatened at Happy Jack's. He asked the bartender either to call the police or to let him use the telephone to call them. The bartender allegedly refused to do either. (It is not clear where the telephone was located.) The man threatened the plaintiff's father who, soon afterward, was shot and killed.

After discussing the duty to rescue, the court held defendant liable: "We conclude that the bartender owed a duty to plaintiff's decedent to permit the patron from Happy Jack's to call the police.

It bears emphasizing that the duty in this case does not require that one go to the aid of another. That is not the issue here. The employee was not the good Samaritan intent on aiding another. The patron was."

**Podias v. Mairs, 926 A.2d 859 (N.J. 2007)**

"At issue is whether passengers in a car may, in certain circumstances, owe a duty to a pedestrian struck by a driver.

...

At approximately 2:00 a.m., while traveling southbound in the center lane of the Garden State Parkway, Mairs lost control of the car, struck a motorcycle driven by Antonios Podias, and went over the guardrail. All three exited the vehicle and 'huddled' around the car. Swanson saw Podias lying in the roadway and because he saw no movement and heard no sound, told Mairs and Newell that he thought Mairs had killed the cyclist. At that time, there were no other cars on the road, or witnesses for that matter.

Even though all three had cell phones, no one called for assistance. Instead they argued about whether the car had collided with the motorcycle. And, within minutes of the accident, Mairs called his girlfriend on Newell's cell phone since his was lost when he got out of the car. Swanson also used his cell phone, placing seventeen calls in the next one-and-one-half hours. Twenty-six additional calls were made from Newell's cell phone in the two-and-one-half hours after the accident, the first just three minutes post-accident and to Matawan, where Chomko resides. None of these, however, were emergency assistance calls. As Swanson later explained: 'I didn't feel responsible to call the police.' And Newell just 'didn't want to get in trouble.'

After about five or ten minutes, the trio all decided to get back in the car and leave the scene.

Ordinarily, then, mere presence at the commission of the wrong, or failure to object to it, is not enough to charge one with responsibility inasmuch as there is no duty to take affirmative steps to interfere.

[E]ven though the defendant may be under no obligation to render assistance himself, he is at least required to take reasonable care that he does not prevent others from giving it. *Soldano v. O'Daniels*, 141 Cal. App.3d 443, 190 Cal.Rptr. 310 (1983). In other words, there may be liability for interfering with the plaintiff's opportunity of obtaining assistance. And even where the original danger was created by innocent conduct, involving no fault on the part of the defendant, there may be a duty to make a reasonable effort to give assistance and avoid further harm where the prior innocent conduct has created an unreasonable risk of harm to the plaintiff. *Hollinbeck v. Downey*, 261 Minn. 481, 113 N.W.2d 9 (1962); 1965 Restatement § 321.2 . . .

Governed by these principles, we are satisfied that the summary judgment record admits of sufficient facts from which a reasonable jury could find defendants breached a duty which proximately caused the victim's death. In the first place, the risk of harm, even death, to the injured victim lying helpless in the middle of a roadway, from the failure of defendants to summon help or take other precautionary measures was readily and clearly foreseeable. Not only were defendants aware of the risk of harm created by their own inaction, but were in a unique position to know of the risk of harm posed by Mairs' own omission in that regard, as well as Mairs' earlier precipatory conduct in driving after having consumed alcohol. Even absent any encouragement on their part, defendants had special reason to know that Mairs would not himself summon help, but instead illegally depart the scene of a hit-and-run accident, *N.J.S.A.* 39:4–129; see also *N.J.S.A.* 39:4–130, either intentionally or because of an inability to fulfill a duty directly owed the victim, thereby further endangering the decedent's safety.

Juxtaposed against the obvious foreseeability of harm is the relative ease with which it could have been prevented. All three individuals had cell phones and in fact used them immediately before and after the accident for their own purposes, rather than to call for emergency assistance for another in need."

### Chinese Law

Chinese law does not require one person to rescue another, but to do so is regarded as a strong moral duty. In a famous 2007 case, the case of *Peng Yu*, Peng Yu reached out to the media and claimed that he was sued by an old lady whom he helped. According to him, she sued for her injuries after he helped her up and took her to hospital when she was knocked over by others when getting off a bus. The court decision triggered widespread criticism, particularly because the judge reasoned that he would not have provided help had he not caused the injury. Even though Peng Yu was not

found to be negligent, he was found to be the person who knocked the plaintiff over and was held liable for 40 percent of the damages under “liability in equity,” a form of no-fault liability we will consider later but which imposes liability on a person who causes harm even if he was not at fault. The public regarded the decision as idiotic and degrading to Chinese traditional morals which require people to act when others are in need.

After this incident, according to a survey conducted in 2013, 84.9 percent of the public responded that they would be hesitant to help a fallen elder.<sup>1</sup> In 2017, the Supreme People’s Court in its official blog post sought to set the record straight and restore the public confidence in the judicial system.<sup>2</sup> According to the post, Peng Yu admitted that he was actually the person who injured the old lady by knocking her over. Those facts were supported by a police statement. The Supreme Court implored the public to restore the vanishing traditional value and help people in need. Still, to deter victims from making false allegations towards the rescuer, the following law was enacted in 2017:

### General Provisions of Civil Law

#### ARTICLE 184

A rescuer who voluntarily acted to provide help and caused the person in peril harm shall not be subject to any civil liability.

(As of January 2021, Article 184 becomes Article 184 of the Chinese Civil Code.)

### French Law

#### French Criminal Code

#### ARTICLE 63(2)

One who voluntarily abstains from giving assistance to a person in peril when he can do so without risk to himself or a third party [is punishable by imprisonment of three months to five years and a fine of 360 to 20,000 francs].

**Note.** French courts have held that one who violates this provision is civilly liable to the plaintiff under Articles 1240–1 of the French Civil Code for committing a fault. Cass., Crim. ch., 16 Mar. 1972, 1972 Bull. crim. 109.

1. 向楠, 倘凌越 《84.9%公众坦言扶不扶老人很纠结》 [Xiang Nan and Tang Lingyue, 84.9% of Public Said They would be Hesitant to Help Fallen Elders on the Street] *China Youth Daily* [http://zqb.cyol.com/html/2013-](http://zqb.cyol.com/html/2013-12/10/nw.D110000zgqnb_20131210_2-07.htm)

[12/10/nw.D110000zgqnb\\_20131210\\_2-07.htm](http://zqb.cyol.com/html/2013-12/10/nw.D110000zgqnb_20131210_2-07.htm) (accessed May 20, 2020).

2. Supreme Court’s official blogpost [www.weibo.com/3908755088/F7TWtpb3w?type=comment#\\_rnd1566948447042](http://www.weibo.com/3908755088/F7TWtpb3w?type=comment#_rnd1566948447042) (accessed May 20, 2020).

## German Law

### German Criminal Code

#### § 323c

One who does not give help in the event of an accident, a common danger or need although it is necessary and demanded of him by the circumstances, and, in particular, is possible without serious danger to himself and without violation of other more important duties is punishable by imprisonment of up to one year or with a fine.

**Note.** Section 823(2) of the German Civil Code provides: “The same obligation [to pay compensation for damages] rests on a person who infringes a statute intended for the protection of others.” German courts have held that a person who fails to rescue under § 323c of the German Civil Code is liable in tort under this provision. BGH, 4 May 2013, ZR 255/11.

## ii. Implications of Recognizing a Duty to Rescue

It is clear how these French and German laws would deal with cases like the shooting at Happy Jack’s Saloon. As the following cases illustrate, other implications are less obvious. (Since the numbering of the provisions of the German Criminal Code has changed since these cases were decided, the new numbers have been substituted for the old to avoid confusion.)

### Rescuing Those Who Attempt Suicide

#### French law

**Cour de cassation, ch. crim., May 13, 1998, pourvoi no. 97–81.969, arrêt no. 2988**

Valérie C. was charged with failure to come to the assistance of Emmanuel G. After telling her he would hang himself, he went into the bathroom and committed suicide. The lower court held C. not guilty; the *Cour d’appel* affirmed: “on the grounds that the civil parties (*parties civiles*) maintain that against Valérie C. are all the elements that constitute the crime of non-assistance to a person in peril; that nevertheless, the structure of this crime presupposes that there is an imminent and existing peril necessitating immediate assistance; that neither the threat of Emmanuel G. (whose personality would not make one fear that he would put his threat into execution) nor the fact that he entered the bathroom (a place a priori not propitious for the execution of such a threat), nor the unconfirmed declarations of the sister of Jean-Christophe G. are circumstances sufficient to permit one to say that Emmanuel G. was seriously going to put an end to his life and that, effectively, there was an imminent and existing peril warranting immediate assistance . . . .”

[The *Cour de cassation* affirmed, saying that it was satisfied with the findings of the *Cour d'appel*.]

### German law

#### Bundesgerichtshof, February 12, 1952, BGHSt. 2, 150

“The defendant’s husband killed himself by hanging because of marital and household quarrels. While he was already unconscious but still could be rescued, the defendant came, observed this, but nevertheless let him hang. She was ‘in accord with the course of events that had come to pass without her doing anything’ and ‘did not wish to alter them by providing assistance.’

Section [323c] of the Criminal Code is certainly valid, but it is not applicable here. An ‘accident’ is a sudden outer event that causes serious harm to persons or things and threatens to cause further harm. RGSt 75, 68; id. 75, 162; id. 77, 303. This outer event is independent of the will of the victim: he can only try to avoid it. Here, we can leave aside whether unexpectedly committing suicide can, under circumstances, be such an outer event. In any case, linguistically and conceptually, there cannot be an accident when person responsible for the suicide produced the danger to his life essentially as he conceived it, and as long as he truly had the will to kill himself.”

[The court went on to say that the woman might still be guilty, not under § 323c, but because married people have a special duty to look out for each other. It remanded, however, for findings on her mental state and in particular on her awareness that she was violating this duty.]

**Note.** Later decisions make it clear (as this court implied) that suicide will count as an accident when the perpetrator is insane and therefore deemed not to “truly will” his own death. Nevertheless, there has been considerable discussion in Germany of whether there should be a duty to rescue a person who is attempting to commit suicide. See Adolf Schönke, Horst Schröder, Albin Eser, and Detlev Sternberg-Lieben, *Strafgesetzbuch* (29th edn., 2014), nos. 41–3. For the opinion that the duty begins when that person is losing consciousness, see BGH NJW 60, 1821; LG Bayern, NJW 73, 565.

**Note.** In American law, although there is no general duty to rescue, a case like this would be handled in a similar way. There is a duty to rescue a spouse, a child, or other person to whom one stands in a special relationship.

### Rescuing One’s Victims

#### French Law

#### *Cour de cassation*, ch. crim., December 3, 1997, *pourvoi no. 95–85.915*, *arrêt no. 6405*

“The decision under appeal . . . declared A. responsible for 1/4 of the physical harm suffered by Serge G. and, as a result, held him liable *in solidum* with Nysor Z. to pay to this civil party (*partie civile*) the sum of



3,000 francs, the amount being provisional while awaiting the results of a medical report that the court ordered . . .

[I]t is shown from the findings of the court below that after Serge G. was seriously injured and immobilized after hitting the stone marking the side of the road with his automobile, Samir A., A. and Nysor Z. arrived at the scene; that Samir A. took off his jacket and stole it along with several objects that it contained; that all three left without giving him help; that they were prosecuted and convicted, the first, a minor, by the *Tribunal pour enfants* for non-assistance to a person in peril and aggravated theft, and the others, by the *Tribunal correctionnel*, for non-assistance to a person in peril and for complicity in theft.”

The *Cour de cassation* affirmed without discussion.

### German Law

#### **Bundesgerichtshof, May 6, 1960, BGHSt. 14, 282**

“The lower court convicted the defendant of serious bodily injury leading to the death of the victim.

The prosecutor brought charges of wrongful omission of assistance under [§ 323c] of the Criminal Code. The accusation is that the defendant did not immediately seek medical care for F. on whom he had inflicted life threatening injuries from which he later died . . .

On the night of 30 August 1958, defendant met F., an assistant, in a shop belonging to friends in H. He was unknown to F. and seriously drunk. [A fight ensued in which the defendant beat F. senseless and left him lying outside the shop on the street.]

[The court said that if the defendant had intended the death of F., he would be guilty of intentional homicide. That would be so even if his intent were conditional in the sense explained earlier: he envisioned it and was indifferent to it although he did not desire it. Here, however the defendant did not have that intent. Nevertheless, he is still liable under § 323c.]

The established case law of this Senate holds that one whose negligence in traffic has placed another in danger of life or limb and does not provide him with the assistance he requires is culpable under § [323c]. This point of criminal law is also applicable when one person by an intentional criminal act has placed another in a condition which is an accident for the other person provided that the victim is threatened with greater harm than the actor intended.”

### **Failing to be in a Fit State to Rescue**

#### **German Law**

#### **Oberlandesgericht, Bavaria, February 22, 1974, NJW 1974, 1520**

“The defendant, an innkeeper, through the use of alcohol fell into a state in which he was unable to discern the illegality of his action and to act

accordingly. After 7:00 P.M., W. had a collision in front of the inn – presumably from failing to make a left turn – and suffered serious head injuries. Witness K. wanted to summon help quickly. She went into defendant's inn which was open since 7:00 to telephone from there. She called to the defendant, who was on the 1st floor [which Americans call the 2nd floor] that she needed an ambulance and police for a man who was lying in front of the building. The defendant, whose telephone was closest to the place of the accident, answered that what was in front of his building was of no concern to him."

He was convicted under what is now § 323c of the German Criminal Code. The court observed that the Code makes it punishable for a person "negligently or intentionally" to get drunk if the person "commits an illegal act while in this state and cannot be punished for it because he was not capable of fault due to his drunkenness . . . ." The court said that it did not matter that his illegal act consisted in an omission – failure to give help as required by what is now § 323c. It also said:

"[I]t is obvious that the 32 year old defendant, as an innkeeper, had sufficient experience of life to know that drunkenness can lead to criminally punishable acts or omissions. He could and should have foreseen that what can happen to one when one is drunk could happen to him as well. Besides, as the findings below establish, the defendant must have been aware that the inn he had closed in the afternoon would be open again at 7:00 P.M., and that he would then have to resume his duties to the public . . . ."

## **4. Strict Liability**

### **a. Liability for Dangerous or "Non-Natural" Activities**

#### **English Law**

#### **Fletcher v. Rylands, (1866) L.R. 1 Ex. 265**

The defendant built a reservoir on his land unaware that it had once been mined for coal and ancient shafts still lay under the ground. Because of the shafts, the water in the reservoir escaped and flooded the plaintiff's land.

Blackburn, J. "We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's

privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stench.

The case that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land, to prevent their escaping and doing mischief. The law as to them seems to be perfectly well settled from early times; the owner must keep them at his peril . . . .”

### **Rylands v. Fletcher, [1868] L.R. 3 H.L. 330**

Cairns, L.C. “My Lords, the principles on which this case must be determined appear to me to be extremely simple. The Defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used, and if, in what I may term the natural use of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the Defendants in order to have prevented the operation of the law of nature . . . .

On the other hand if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril . . . .”

### **Read v. J. Lyons & Co., Ltd., [1947] A.C. 156 (H.L.)**

“The respondents, under an agreement with the Ministry of Supply, undertook the operation, management and control of an ordnance factory

as agents for the Ministry, and carried on in the factory the business of filling shell cases with high explosives. The appellant was an employee of the Ministry, with the duty of inspecting the filling of shell cases, and, while lawfully in the shell-filling shop in discharge of her duty, was injured by the explosion of a shell. In an action for damages for the injuries sustained no negligence was averred or proved against the respondents.”

Viscount Simond. “Now, the strict liability recognised by this House to exist in *Rylands v. Fletcher* is conditioned by two elements which I may call the condition of ‘escape’ from the land of something likely to do mischief if it escapes, and the condition of ‘non-natural use’ of the land. This second condition has in some later cases, which did not reach this House, been otherwise expressed, e.g., as ‘exceptional’ user, when such user is not regarded as ‘natural’ and at the same time is likely to produce mischief if there is an ‘escape.’ . . . It is not necessary to analyse this second condition on the present occasion, for in the case now before us the first essential condition of ‘escape’ does not seem to me to be present at all. ‘Escape,’ for the purpose of applying the proposition in *Rylands v. Fletcher* means escape from a place which the defendant has occupation of, or control over, to a place which is outside his occupation or control . . . Here there is no escape of the relevant kind at all and the appellant’s action fails on that ground.”

### **W.V.H. Rogers, *Winfield & Jolowicz on Tort* (15th edn., 1998), 546**

“The rule is not confined to the case where the defendant is the freeholder of the land on which the dangerous thing is accumulated: the defendant in *Rylands v. Fletcher* itself appears to have had only a license from the land-owner to construct the reservoir. Similarly, the rule has been applied in cases where the defendant has a franchise or statutory right, for example to lay pipes to carry gas<sup>1</sup> or cables for electricity.<sup>2</sup> Indeed, there are statements to the effect that anyone who collects the dangerous thing and has control of it at the time of the escape would be liable,<sup>3</sup> even when it is being carried on the highway and escapes therefrom.”<sup>4</sup>

### **Cambridge Water Co Ltd v. Eastern Counties Leather plc., [1994] 2 AC 264 (H.L.)**

“The defendant was an old-established leather manufacturer which used a chemical solvent in its tanning process. In the course of the process there were regular spillages of relatively small amounts of the solvent onto the concrete floor of the tannery prior to a change of method in 1971, the total spillage over a period of years being at least 1,000 gallons. The spilled

1. *Northwestern Utilities Ltd v. London Guarantee Ltd* [1936] A.C. 108 at 118; cf. *Read v. Lyons* [1947] A.C. 156 at 183.

2. *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.* [1914] 3 K.B. 772.

3. *Rainham Chemical Works v. Belvedere Fish Guano Co.* [1921] 2 A.C. 465 at 479.

4. *Powell v. Fall* (1880) 5 Q.B.D. 597; *Rigby v. Chief Constable of Northamptonshire* [1985] 1 Q.L.R. 1242. See also *Crown River Cruises v. Kimbolton Fireworks* [1995] 2 Lloyd’s Rep. 533.

solvent, which was not readily soluble in water, seeped through the tannery floor into the soil below until it reached an impermeable strata 50 metres below the surface from where it percolated along a plume at the rate of about 8 metres a day until it reached the strata from which the plaintiffs extracted water for domestic use via a borehole. The distance between the plaintiffs' borehole and the defendants' tannery was 173 miles and time taken for the solvent to seep from the tannery to the borehole was about 9 months."

The court held that the plaintiff could not recover either in nuisance or under the rule in *Rylands v. Fletcher* unless the defendant could have foreseen that its activity might cause the harm the plaintiff suffered. In reaching his conclusion, however, Lord Goff reconsidered the foundations and the scope of the rule in *Rylands v. Fletcher*.

Lord Goff of Chieveley. "In order to consider the question in the present case in its proper legal context, it is desirable to look at the nature of liability in a case such as the present in relation both to the law of nuisance and the rule in *Rylands v. Fletcher*, and for that purpose to consider the relationship between the two heads of liability.

I begin with the law of nuisance. Our modern understanding of the nature and scope of the law of nuisance was much enhanced by Professor Newark's seminal article 'The boundaries of nuisance' (1949) 65 LQR 480 ... Professor Newark considered (at pp 487–488) [that there had been] a misappreciation of the decision in *Rylands v. Fletcher*: 'This case is generally regarded as an important landmark, indeed a turning point – in the law of tort; but an examination of the judgments shows that those who decided it were quite unconscious of any revolutionary or reactionary principles implicit in the decision. They thought of it as calling for no more than a restatement of settled principles, and Lord Cairns went so far as to describe those principles as 'extremely simple'. And in fact the main principle involved was extremely simple, being no more than the principle that negligence is not an element in the tort of nuisance. It is true that Blackburn J. in his great judgment in the Exchequer Chamber never once used the word 'nuisance', but three times he cited the case of fumes escaping from an alkali works – a clear case of nuisance – as an instance of liability, under the rule which he was laying down. Equally it is true that in 1866 there were a number of cases in the reports suggesting that persons who controlled dangerous things were under a strict duty to take care, but as none of these cases had anything to do with nuisance Blackburn J. did not refer to them. But the profession as a whole, whose conceptions of the boundaries of nuisance were now becoming fogged, failed to see in *Rylands v. Fletcher* a simple case of nuisance. They regarded it as an exceptional case – and the rule in *Rylands v. Fletcher* as a generalisation of exceptional cases, where liability was to be strict on account of 'the magnitude of danger, coupled with the difficulty of proving negligence' [Pollock on Torts (14th edn, 1939) p. 386] rather than on account of the nature of the plaintiff's interest which was invaded. They therefore jumped rashly to two conclusions: firstly, that the rule in *Rylands v. Fletcher* could be extended beyond the case of neighbouring occupiers; and secondly, that the rule could be used to afford a remedy in cases of personal injury ...'

We are not concerned in the present case with the problem of personal injuries, but we are concerned with the scope of liability in nuisance and in *Rylands v. Fletcher*. In my opinion it is right to take as our starting point the fact that, as Professor Newark considered, *Rylands v. Fletcher* was indeed not regarded by Blackburn J. as a revolutionary decision . . . [T]he essential basis of liability was the collection by the defendant of such things upon his land; and the consequence was a strict liability in the event of damage caused by their escape, even if the escape was an isolated event. Seen in its context, there is no reason to suppose that Blackburn J. intended to create a liability any more strict than that created by the law of nuisance; but even so he must have intended that, in the circumstances specified by him, there should be liability for damage resulting from an isolated escape . . .

It is against this background that it is necessary to consider the question whether foreseeability of harm of the relevant type is an essential element of liability either in nuisance or under the rule in *Rylands v. Fletcher*. I shall take first the case of nuisance.”

Lord Goff concludes that foreseeability of the relevant type of harm is, indeed, required for liability in nuisance. He argues that “the historical connection with the law of nuisance must now be regarded as pointing towards the conclusion that foreseeability of damage is a prerequisite of the recovery of damages under the rule” in *Rylands v. Fletcher*.

“Even so, the question cannot be considered solely as a matter of history. It can be argued that the rule in *Rylands v. Fletcher* should not be regarded simply as an extension of the law of nuisance, but should rather be treated as a developing principle of strict liability from which can be derived a general rule of strict liability for damage caused by ultra-hazardous operations, on the basis of which persons conducting such operations may properly be held strictly liable for the extraordinary risk to others involved in such operations. As is pointed out in Fleming on Torts (8th edn, 1992) pp. 327–328, this would lead to the practical result that the cost of damage resulting from such operations would have to be absorbed as part of the overheads of the relevant business rather than be borne (where there is no negligence) by the injured person or his insurers, or even by the community at large. Such a development appears to have been taking place in the United States, as can be seen from § 519 of the Restatement of Torts (2d) vol 3 (1977). The extent to which it has done so is not altogether clear; and I infer from para 519, and the comment on that paragraph, that the abnormally dangerous activities there referred to are such that their ability to cause harm would be obvious to any reasonable person who carried them on.

I have to say, however, that there are serious obstacles in the way of the development of the rule in *Rylands v. Fletcher* in this way. First of all, if it was so to develop, it should logically apply to liability to all persons suffering injury by reason of the ultra-hazardous operations; but the decision of this House in *Read v. J Lyons & Co Ltd* [1946] 2 All ER 471 [1947] AC 156, which establishes that there can be no liability under the rule except in circumstances where the injury has been caused by an escape from land under the control of the defendant, has effectively precluded any such development. Professor Fleming has observed that ‘the most damaging effect of the



decision in *Read v. Lyons* is that it prematurely stunted the development of a general theory of strict liability for ultra-hazardous activities' (see Fleming on Torts (8th edn, 1992) p. 341). Even so, there is much to be said for the view that the courts should not be proceeding down the path of developing such a general theory. In this connection, I refer in particular to the Report of the Law Commission on Civil Liability for Dangerous Things and Activities (Law Com no 32) 1970. In paras 14–16 of the report the Law Commission expressed serious misgivings about the adoption of any test for the application of strict liability involving a general concept of 'especially dangerous' or 'ultra-hazardous' activity, having regard to the uncertainties and practical difficulties of its application. If the Law Commission is unwilling to consider statutory reform on this basis, it must follow that judges should if anything be even more reluctant to proceed down that path.

Like the judge in the present case, I incline to the opinion that, as a general rule, it is more appropriate for strict liability in respect of operations of high risk to be imposed by Parliament, than by the courts. If such liability is imposed by statute, the relevant activities can be identified, and those concerned can know where they stand. Furthermore, statute can where appropriate lay down precise criteria establishing the incidence and scope of such liability."

**Edwin Peel and James Goudkamp, *Winfield and Jolowicz on Tort* (19th edn., 2014), 499, 501, 503**

Approaches to strict liability like the one in *Cambridge Water Co.* "are subject to the objection that they would leave without redress (except in so far provided by the law of nuisance) any persons suffering from an activity which was not the subject of legislation ... If there is a regime of strict liability for a burst watermain, why should the victim of a gas explosion be in any different position? ... The absence of a 'general clause' on strict liability may hamper the courts in fairly allocating responsibility ... Nevertheless, the introduction of such a general clause would present formidable problems of uncertainty in its relationship with the fault regime."

"Over the years *Rylands v. Fletcher* has been applied (or said to apply, because the cases sometimes turned on other points) to a remarkable variety of things: fire; gas; blasting and munitions; electricity; oil and petrol; noxious fumes; colliery spoil; rusty wire from a decayed fence; vibrations; poisonous vegetation; a flag pole; a 'chair-o-plane' in a fair-ground; and even (in a case of very questionable validity) noxious persons. Given the emphasis in the *Cambridge Water* case on the close connection with the law of nuisance and the rejection of a broad rule governing ultra-hazardous activities there is probably now little point in seeking to identify the characteristics of a '*Rylands v. Fletcher* object'. What matters is the scale of risk presented by the defendant's activity: a box of matches or a glass of water do not fall within the rule, a million boxes of matches in a store or a reservoir may do so. The requirement that the thing must be likely to do mischief if it escapes cannot therefore be viewed in isolation

from the further requirement of a non-natural user, which encapsulates the rule.

The defendant need not have an interest in the land from which the escape emanates. The rule is not confined to the case where the defendant is the freeholder of the land . . . [T]he rule has been applied in cases where the defendant has a franchise or statutory right, for example to lay pipes to carry gas or cables for electricity. Indeed, there are statements to the effect that anyone who collects the dangerous thing and has control of it at the time of the escape would be liable, even when it is being carried on the highway and escapes therefrom . . .

The claimant must have an interest in the land. As to the position of the claimant, the position is governed by the fact that the rule is an offshoot or variety of private nuisance . . . A number of earlier cases applying *Rylands v. Fletcher* should therefore be regarded as wrongly decided on this basis alone.”

### Law in the United States

#### Restatement (Third) of Torts (Liability for Physical and Emotional Harm)

##### § 21 ABNORMALLY DANGEROUS ACTIVITIES

- (a). An actor who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.
- (b). An activity is abnormally dangerous if:
  - (1). the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and
  - (2). the activity is not a matter of common usage.

**Dan B. Dobbs, Paul T. Hayden, and Ellen M. Bublick, *Hornbook on Torts* (2nd edn., 2016). 786–8.**

“Courts now have generally accepted the principle that for some activities involving special dangers, especially those not commonly pursued, liability can be imposed without fault. However, aside from a few clear cases the decisions . . . do not harmonize pleasantly. Frequently enough, courts reject strict liability in particular cases because the evidence does not demonstrate that the activity in issue is highly dangerous or that it cannot be made safe by the exercise of care. Courts also reject strict liability in particular cases on the ground that the activity is one commonly pursued by the community.

. . . Strict liability seems most readily imposed when physical harm results from defendant’s use or storage of dynamite or other materials intended to cause explosions.

. . .

It is difficult to reconcile all of the decisions, however. Materials such as gasoline, propane and natural gas have explosive and

flammable potential. In line with what has been said, some authority supports strict liability when such items are stored or accumulated in unusual volume. Many decisions, however, have rejected such liability ... Apparently all of them have rejected it for explosions of natural gas in connection with its transmission in mains or pipes. Likewise, strict liability has been rejected when such substances as propane or gas are used as fuel for vehicles, factories, or homes. Transmission of electricity in uninsulated power lines is not regarded as an abnormally dangerous activity ...

... Strict liability for abnormally dangerous activities has been imposed when the defendant has used toxic materials commercially to kill pests or protect crops ...

On the other hand, when the release of dangerous materials was unintentional, courts have sometimes emphasized that the activity, not merely the substance, must be abnormally dangerous. The idea is that although the substance may be dangerous – asbestos and chlorine gas are examples – some activities dealing with the substance may be carried out with reasonable safety, thereby precluding strict liability.”

### German Law

**Note on the Origins of Strict Liability in Germany.** Roman law recognized instances of strict liability. Nevertheless, the German Civil Code does not provide for strict liability in tort. The reason is that for centuries before it was drafted, legal scholars had been sceptical about whether there could be any reason in principle for strict liability.

As we have seen, Roman law gave an action under the *lex Aquilia*, for damage done by fault (*culpa*). It also recognized certain cases of strict liability. A number of them look like the kind American law treats with the doctrine of *res ipsa loquitur*. The defendant is likely to have been at fault though there is no direct evidence. For example, the plaintiff is struck by an object thrown from the defendant’s window or hung by the defendant over the street, or he is robbed while staying in the defendant’s inn.<sup>1</sup>

In American law, if the plaintiff were struck by an object that fell from defendant’s building, and if it is likely that this event occurred because the defendant or his employee was negligent, then the plaintiff does not have to make any other proof of negligence: the thing speaks for itself, which is what *res ipsa loquitur* means. The defendant then has the burden of proving that he was not negligent. Roman law was different. The defendant was liable without any proof of fault in the situations just described, and he was not allowed to prove he had not been negligent. But perhaps the underlying problem is the same: what to do when the defendant is likely to have been negligent, and the

1. G. Inst. 4.5.

plaintiff has no way of proving that he was other than by pointing to the situation.

Two Roman actions were available in situations with a closer resemblance to those in which some modern systems impose strict liability. Plaintiff could recover using the action *de pauperie* against the owner of domestic animals for harm that they caused.<sup>2</sup> The action was “noxal”: the owner could escape further liability by surrendering the animal to the plaintiff. The plaintiff could recover for harm caused by wild animals under the *edictum de feris*.<sup>3</sup> This action could be brought against anyone who had custody of the animal, whether or not he owned it. Also, a Roman family head (*paterfamilias*) was liable for torts committed by his child or his slave.<sup>4</sup> Again, liability was “noxal”: he could escape liability by surrendering the child or the slave. By post classical times, he was no longer permitted to surrender the child.<sup>5</sup>

Medieval and early modern jurists preserved the Roman rules, although, as slavery had largely disappeared, there was an ongoing debate over whether a master was liable for torts committed by his servants.<sup>6</sup> They did not suggest why there should be strict liability in such cases.

Most of the late scholastics and northern natural lawyers found the matter puzzling. Again, late scholastics were drawing on Aristotle and Thomas Aquinas. As we have seen, Aristotle had distinguished voluntary from involuntary commutative justice. In the former case, the parties exchanged equivalents; in the latter, one party had wrongfully deprived the other of something and had to restore equality by giving him an equivalent.<sup>7</sup> Aquinas put the two ideas together: a party who injured another through his fault was obliged as a matter of commutative justice to compensate him.<sup>8</sup> If the party was not at fault, he was not obliged to compensate because, according to Aquinas, *qua* human being, he had not caused the harm.<sup>9</sup> Here, he was drawing on Aristotle’s idea that man was a rational animal: he acts by understanding his end and choosing accordingly. Therefore, a person was not responsible if he did not choose, for example, if he did harm because his body was moved by irresistible force.<sup>10</sup> Late scholastics such as Luis de Molina and Leonard Lessius concluded that, in principle, a person should only be liable for fault.<sup>11</sup> Hugo Grotius agreed.<sup>12</sup>

Samuel Pufendorf was one of the few who thought that one could find a principled explanation for strict liability. The owner of an animal should be liable for the harm it does because “the owner gets the profit from his animal while [the victim] suffered loss from it.”<sup>13</sup> As we will see, this

2. See generally, Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990), 1096–104.

3. See generally *ibid.* 1104–7.

4. See generally *ibid.* 1118–20.

5. *Ibid.* 1118–19.

6. *Ibid.* 1119.

7. *Nicomachean Ethics* V.ii.

8. *Summa theologiae* Q. 61, a. 3; Q. 64, a. 8.

9. *Ibid.* I-II, Q. 6, aa. 1, 5–8; II-II, Q. 64, a. 8.

10. *Nicomachean Ethics* III.i.

11. Ludovicus Molina, *De iustitia et iure tractatus* (1614), disp. 698; Leonardus Lessius, *De iustitia et iure ceterisque virtutibus cardinalis libri quatuor* (1628), lib. 2, cap. 7, dubs. 2 & 6.

12. Hugo Grotius, *De iure belli ac pacis libri tres* (1646), II.xvii.21.

13. Samuel Pufendorf, *De iure nature ac gentium libri octo* (1688), III.i.6.

suggestion was picked up by Jean Domat and may have influenced the drafters of the French Civil Code. But no one made a systematic attempt to turn this insight into a theory of liability without fault.

Nineteenth-century German jurists took the same position as most of the natural lawyers. In principle or in theory, one could not explain strict liability. The German jurist Puchta argued that liability that went beyond fault was liability for chance.<sup>14</sup> The implied premise was that such a liability would extend indefinitely. There would be no way in principle to limit it.

Nevertheless, while the German Civil Code contains no provisions on strict liability, since the nineteenth century, the German legislature has been enacting special statutes holding a person strictly liable who engages in certain activities. The German courts have refused to extend the scope of strict liability by drawing analogies to these activities. And so, today, the defendant is strictly liable only if he engaged in an activity covered by a special statute.

**Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn., trans. by Tony Weir, 1998), 653–9**

“In *German* law, apart from liability for ‘luxury animals’,<sup>15</sup> strict liability has been introduced exclusively by the legislator in a long series of special statutes not incorporated in the BGB. The reason for this is presumably that the German legislator still regards the principle of fault as the essence of the law of delict, and considers strict liability as anomalous and exceptional, meriting the less exalted status of enactment in special detailed statutes. There is also a long tradition behind this tendency to use special statutes: in 1838 § 25 of the Prussian Law of Railway Undertakings imposed strict liability on railways for all harm to persons or property occurring ‘through carriage on the railway’ unless the defendant could prove ‘that the harm was caused by the fault of the victim or by an external and unavoidable event’. This statute was adopted in similar form by other states in Germany and in 1869 by Austria as well. 1871 saw the enactment of the Imperial Law of Liability, which is still in force today, though it has been amended frequently and is now called simply the Law of Liability. It lays down strict liability for harm to persons arising ‘through the operation’ of railways.

14. G.F. Puchta, *Pandekten* (7th edn., 1853), § 266. Similarly, see B. Windscheid, *Lehrbuch des Pandektenrechts* (7th edn., 1891), § 101.

15. Editor’s note: The authors are referring to § 833 of the Civil Code: “If a person is killed or a person’s body or health is injured or an object is harmed by an animal, the one who keeps [hält] the animal is obligated to compensate the injured person for the harm that results. The duty to compensate does not arise when the harm is

caused by a tame animal [Haustier] which is kept on account of the occupation, livelihood or maintenance of its keeper, and either the keeper has used the care ordinarily required to look after the animal, or the harm would have been done even if this care had been used.” The original version contained only the first sentence. The second was added at the urging of agricultural interests. The animals to which the exemption of the second sentence does not apply are the so-called “luxury animals.”

Harm is caused 'through the operation' of the railway if it is caused or contributed to by sudden braking, collapse of the track, sparks from the trains, signal failure, or other incidents of the technical operation of running a railway. Accidents to persons mounting or dismounting from trains or using railway stations are also included if they are due to the specific dangers of railway travel such as the height of the running-boards, the haste of passengers, or the crowd on the platform, but a person who falls on a stairway in a station simply because the steps are defective can claim damages only under § 823 par. 1 BGB. The railway is not liable for accidents caused by *force majeure* (*höhere Gewalt*). This is understood by the courts to mean external and elemental forces of nature or the conduct of third parties whose effects could not have been prevented even by the most extreme precautions. The railways will even be liable for flash floods, heavy snowstorms, or avalanches unless no conceivable precautions, such as a warning system or a reduction of speed, could have forestalled the accident. Nor is it a case of *force majeure* if the event which caused the harm is of such frequent occurrence that the railway should take account of it even if it can do nothing about it.

A passenger injured by sudden braking may sue the railway even if it is due to the quite unforeseeable appearance on the track of children or cattle which have broken through the protective fence. See RGZ 54,404; BGH VersR 1955,346.

If a victim contributes to the accident by his own fault, the courts weigh up the extent to which the dangerousness of the railway and the fault of the victim contributed to the harm and apportion that damages accordingly (see BGHZ 2,355).

In 1943 and 1977 the Law of Liability was extended by special statutes to cover cases in which death or personal injury is caused 'by the effects of electricity, gases, vapours, or liquids' coming from 'an installation for their transmission or supply by cable, pipe, or otherwise'. Included in particular are high tension cables, gasholders, steam conduits, and waterpipes. Once again liability is in principle excluded only in cases of *force majeure*. In a case where an 11-year-old child was injured when his kite, attached by wire rather than thread, came in contact with a high tension cable the Bundesgerichtshof held the defendant liable (BGHZ 7,338); such an accident was very unusual but it did not have that extraordinary, 'almost elemental quality' required before one could speak of *force majeure*. In such a case, however, the damages may be reduced on the ground of the plaintiff's contributory fault.

The liability of the custodian of a *motor vehicle* is less strict. It was introduced in 1908 and is now contained in the Road Traffic Act of 1952 (StVG). § 7 StVG makes the custodian of a motor vehicle ('Halter' – normally, but not necessarily, the owner) liable for damage to person or property which arises 'through the operation' of the vehicle. Liability is excluded:

if the accident is caused by an unavoidable event attributable neither to a defect in the construction of the vehicle nor to a failure of any of its functional parts. In particular an event is unavoidable when it is



attributable to the behaviour of the victim or of a third party not involved in the operation or of an animal, and both the custodian and the driver of the vehicle have taken all the care called for in the circumstances of the case.

This means that even unforeseeable and unavoidable failure of the components of vehicle – such as a tyre defect, axle fracture through metal fatigue, brake failure, or the steering seizing up – makes the custodian liable, but if the accident is due to an ‘external’ event such as the occurrence of black ice or an animal running in front of the vehicle or faulty driving on the part of other motorists, the custodian is not liable if he can prove that both the driver and he himself observed ‘all the care called for in the circumstances’. Such case is defined by the courts as ‘care going beyond what is usually required, extreme and thoughtful concentration and circumspection’ (BGH VersR 1962, p. 164 and repeatedly thereafter). In practice such proof is hardly ever forthcoming, and only in very few cases – such as when a car leaves the road because of entirely unpredictable black ice or a small child darts out on to the street from between two parked cars and is run over – has it been accepted that the accident was one which an ‘ideally careful’ driver could not have avoided. If any fault on the part of the victim contributed to the occurrence of the harm, damages are reduced as under the Law of Liability. Passengers in a vehicle can only sue the custodian under the Road Traffic Act if they were being carried by way of business and for reward, as in a taxi or bus; injured passengers in other cases must use the general provisions of the law of delict (§§ 823 ff. BGB).

The Air Traffic Law of 1922 lays down an especially strict liability for harm caused to persons and things other than those being carried in the airplane pursuant to contract. In practice this means harm caused on the surface of the earth, whether by flight noise or by crashing or crash-landing: the custodian of an airplane is liable even if he can show that the harm was caused by *force majeure* (see §§ 33 ff. Air Traffic Law).

A characteristic feature of all the statutes mentioned so far is that they strictly limit the amount of damages payable. Claims in respect of immaterial harm are wholly excluded, and an upper monetary limit is also fixed for the liability of the defendant. In the case of death or personal injury the custodian of a motor vehicle is liable only up to 500,000 DM, and if damages are payable in the form of an annuity, it may not exceed 30,000 DM per year. These limits are increased by statutory amendment from time to time in order to take inflation and other factors into account. If several people are injured or killed in the same accident, the applicable limits are 750,000 DM and 45,000 DM; if the total damage exceeds these limits, the victims’ claims are scaled down. This is why almost all damages suits for personal injuries sustained in traffic accidents are based on §§ 823 ff. BGB as well as the Road Traffic Act. Indeed, only so can one obtain damages for pain and suffering. This means that even if liability under the Road Traffic

Act is clear there is often a long and tiresome dispute about the proof of fault.

Since 1939 the custodian of a motor vehicle has been required by law to have insurance covering his own liability and that of the driver for the harm caused by the use of the vehicle. A licence to use the vehicle will only be issued if a certificate of insurance is produced. An analogous duty to insure is imposed on the custodian of an airplane but not on the enterprises rendered liable by the Law of Liability.

Strict liability also arises under the Atomic Energy Act of 1959. A distinction is drawn between the liability of the operator of an *installation* for the production or fission of nuclear materials and the liability of any other possessor or radioactive *materials*. The first is liable for personal injury and property damage caused by the effects of nuclear operations within the installation, even if those effects are due to *force majeure*. The possessor of radioactive materials is less strictly liable: like the custodian of a motor vehicle, he may escape liability by proving that he observed 'all the care called for in the circumstances', but this does not apply if the harm is due to a failure of safety devices, even if this could not have been known or avoided by the defendant. Here also there is a duty to take out insurance, but in view of the enormous risks appertaining to the operation of nuclear installations, further cover is mandatorily provided by the state.

Also important is the liability laid down by the Water Maintenance Act of 1957 (§ 22) for *pollution of water*. Water for this purpose includes all ponds, lakes, rivers, and streams as well as the water-table, and anyone who introduces into such water substances which alter its composition is liable to pay damages for the harm thereby caused to others, including pure economic loss. The same liability, with the exception of *force majeure*, attaches to the operator of an installation for the manufacture, storage, or carriage of materials: if any materials are introduced into water as defined, the operator of the installation is liable in damages. 'Installation' for the purpose of the statute includes not only storage-tanks for oil and paraffin, tanker vessels, and oil pipelines, but also the sort of petrol tankers which supply gas-stations (so BGH VersR 1967, 374). Considering that the pollution of a river or the water-table itself may cause enormous harm, especially of the pure economic variety, it is all the more surprising to find that the Water Maintenance Act diverges from the usual practice of imposing an upper monetary limit to the strict liability of the defendant. The statute does not introduce any obligation to insure, although one may be confident that practically all the operators of installations which carry a risk of water pollution will have taken out suitable insurance policies. All such policies, however, will contain an upper limit and beyond that limit the risk must be borne by the operator himself.

In 1990 a statute made those involved in genetic research strictly liable for personal injury or property damage due to organisms

genetically altered – The Law on Liability for Damages to the Environment (*Unwelthaftungsgesetz*) of the same year makes those operating certain large industrial installations liable for personal injury or property damage due to the effects of emissions. On this see Hager NJW 1991, 134 ...

Given this variety in the grounds of statutory liability, it is not surprising that the German courts have always held that the imposition of strict liability is a matter for the legislature and not for the judiciary. This view may already be found in a judgment of the Reichsgericht in 1912. Graf Zeppelin, whose airship had had to make a forced landing, was sued by a spectator who was struck and injured by the anchor chain when a sudden gust of wind tore the airship loose from its anchors. The question for the Reichsgericht was whether it were possible to apply by analogy the texts which laid down strict liability, such as § 833 BGB, the Imperial Law of Liability, and the very recent statute which imposed liability on the custodian of a motor car. The Reichsgericht held that no such application by analogy was possible, even although the operation of an airship was an act of bravado entailing risks much less under control than those of railways or motor cars; the provisions laying down strict liability were 'by reason of their exceptional character not applicable even to the unusual circumstances of travel by airship' (RGZ 78,172). In a case in which a person was killed by a high tension cable the Reichsgericht decided likewise before the enactment of the special liability for electricity installations. It held that liability without fault could only be imposed by the legislator: 'if the legislator has not done so, it must be concluded that the legislator rejects such far-reaching liability'. Fortunately the court was able to help the widow in the case by reversing the burden of proof and by holding that the duty of care called for very remarkable precautions (see RGZ 147,353) ...

A glance at the patchwork of special instances of strict liability imposed by statutes in Germany ... makes it clear that they leave uncovered many businesses, installations, and activities which pose at least as great a risk of harm. It is far from obvious why a person should be strictly liable if he decides to move earth by means of a light railway while he is liable only for negligence if he uses heavy bulldozers for the job. And why should an injured person's right to damages depend on whether the accident took place on board a steamer or a train? And if a motorized conveyance causes injury, why should liability turn on whether it is a chairlift, a motor car, a motorboat, a light railway, a hoist, a funicular, or an escalator? It may be said that the legislator can always deal with novel needs by introducing new instances of strict liability ... but even so the law will inevitably limp along behind technology; in any case, is it not perhaps unreasonable to take up the time and energy of the legislative machinery, already very stretched, on the amendment of the law on matters which, even in the context of the law of tort, are fairly interstitial?"

**Chinese Law**  
**Chinese Civil Code**

BOOK VII TORT LIABILITY

CHAPTER 8 LIABILITY FOR HIGH RISK

ARTICLE 1236

A person who causes damage to others by engaging in high risk operations shall be liable in tort.

ARTICLE 1237

If damage is inflicted on others from the occurrence of a nuclear accident at a civilian nuclear facility, the operator of the facility shall be liable in tort unless it can prove that the damage arose from circumstances such as war or that it is intentionally caused by the victim.

ARTICLE 1238

If a civilian aircraft causes damage to others, the operator of the aircraft shall be liable in tort unless the damage is intentionally caused by the victim.

ARTICLE 1239

If damage to others arises from the possession or use of high risk materials, including, *inter alia*, flammable, explosive, poisonous and highly radioactive and highly corrosive materials, the users or possessors of such materials shall be liable in tort unless they can prove that the damage was caused by the intentional act of the victim or by force majeure. If the person harmed was grossly negligent with respect to the occurrence of the damage, the liability of the person using or possessing the materials may be exempt from tort liability.

ARTICLE 1240

If damage to others arises from high-altitude, high-pressure or underground excavation activities or the use of high-speed rail transport, the operators shall be liable in tort unless they can prove that the damage was caused by the intentional act of the victim or by force majeure. If the occurrence of the damage was due to the gross negligence of the person harmed, the liability of the operator may be reduced.

ARTICLE 1241

If damage to others arises from the loss or abandonment of a high risk object, the owner of the object shall be liable in tort. If the object has been delivered to a third party by the owner for use, the user shall be liable in tort. If the owner is at fault, he or she shall be liable jointly with the user.

ARTICLE 1242

If damage arises from the illegal possession of highly dangerous objects, the illegal possessor shall be liable in tort. If the owner or user fail to prove that they have exercised a high duty of care in preventing the illegal possession, they shall be jointly liable with the illegal possessor.

## ARTICLE 1243

If damage occurs from unauthorized entry into a high risk activity area or a storage area for high risk materials, the liability of the manager may be mitigated or eliminated if he is able to establish that he has taken safety precautions and has fulfilled his or her obligation to give warnings.

## ARTICLE 1244

If there is a maximum limit to compensation according to the provisions of the law for high risk liability, those provisions shall prevail. However, there will be no limit if the actor acted intentionally or with gross negligence.

## **b. Liability for Harm Caused by Objects in One's Custody in French Law**

### **i. Introduction**

Today, strict liability in France is based on Articles 1242–4 of the Civil Code (formerly Articles 1384–6).

### **French Civil Code**

## ARTICLE 1242

(formerly article 1384)

A person is liable not only for the damage he causes by his own act, but also for that caused by the acts of persons for whom he is responsible or of things that he has under his guard . . .

## ARTICLE 1243

(formerly article 1385)

The owner of an animal, or the person using it during the period of usage, is liable for the damage the animal has caused, whether it was under his guard or whether it had strayed or escaped.

## ARTICLE 1244

(formerly article 1386)

The owner of a building is responsible for the damage caused by its collapse when this has taken place because the building was not maintained properly or because it was poorly constructed.

**Note.** During the nineteenth century, the plaintiff had to prove that the defendant was at fault to recover under these articles. They were thought to be special cases of the liability for fault established by Articles 1240–1 (formerly Articles 1382–3). Maybe that is what the drafters had in mind. But it is hard to say. Neither Domat and Pothier, from whom these provisions were taken, nor the drafters of the Code seem to have been clear in their minds about what they were doing.

As described earlier, the Roman *edictum de feris* imposed strict liability for the keeping of animals. Domat explained the *edictum* by suggesting that a person who had custody or guard (*garde*) of a fierce animal was liable

because he was at fault. But he also made an argument like the one which, as we have seen, Pufendorf made to defend strict liability: “As he profits from the use he can make from this animal, being its owner, and as he can obtain possession of it again, having acquired it for money or by his own efforts, and having expended time and trouble to acquire some profit, he should answer.”<sup>1</sup> Although Pothier did not make this argument, he may not have regarded fault as the only basis for liability.<sup>2</sup>

Articles 1242 to 1243 (formerly Articles 1384–5) were based on the passages from Domat and Pothier just described. The ambiguities which we have just seen passed into the Code. One can see them in the legislative history of these provisions. Bertrand-de-Greuille explained the liability of the owner of animals by stating the “general thesis” that “nothing that belongs to a person can injure another with impunity.”<sup>3</sup> In contrast, Tarrible explained it by the principle that “damage, to be subject to reparation, must be the effect of a fault or imprudence on the part of someone” since otherwise “it is only the work of chance.”<sup>4</sup>

## ii. The Rise of Strict Liability

The following cases played a critical role in the development of strict liability under Article 1242 (formerly Article 1384). Note that in many of these cases, the legislature later enacted a statute to deal with the problem which had concerned the court. Consider whether strict liability might have developed differently in France if these statutes had already been in place.

In reading these cases and those that follow, remember that Articles 1384–6 have been renumbered Articles 1242–4.

### Cour de cassation, ch. civ., June 16, 1896, D. 1897.1.433

On June 4, 1891 there was an explosion aboard the steam-tug Marie. Teffaine, a member of the crew, was fatally injured in the explosion. His widow brought an action for damages in her own name and as guardian of

1. Jean Domat, *Les Loix civiles dans leur ordre naturel* (2nd edn., 1713), liv. 2, tit. 8.

2. Other paragraphs of art. 1384 modeled on Pothier impose liability on parents, teachers, and guardians for harm done by those under their care and by masters for harm done by their servants. Pothier said that parents, guardians, and teachers were not liable for torts they could not prevent committed by those under their authority. In contrast, masters were liable vicariously for torts of their servants even when they could not prevent them. They, apparently, were liable without fault, although Pothier threw this conclusion in doubt by adding: “This has been established to render masters careful to employ only good

servants.” Robert Pothier, *Traité des obligations* (1761), § 121.

3. “Rapport fait par Bertrand-de-Greuille, Communication officielle au Tribunat,” 10 pluviôse an XII (31 Jan. 1804), in P.A. Fenet *Recueil complet des travaux préparatoires du Code Civil* 13 (1827), 477.

4. According to Tarrible, vicarious liability and liability for animals are based on the principle that “damage, to be subject to reparation, must be the effect of a fault or imprudence on the part of someone” since otherwise “it is only the work of chance.” “Discours prononcé par le Tribun Tarrible, Discussion devant le Corps Législatif,” 18 pluviôse, an XII (8 Feb. 1804), in Fenet 13: 488.



his minor children against the owners of the tug, Guissez and Cousin. She claimed that the accident was caused by a defect in the welding of the pipe that exploded. Guissez and Cousin joined Oriolle who manufactured the engine. The plaintiff lost in the court of first instance because she could not prove that any of the defendants had been at fault.

She won before the *Cour d'appel* on the grounds that "Guissez and Cousin, in contracting with Teffaine, assumed as to him the obligation to provide a machine fit for the purposes for which it was to be used." "[I]f, in the instant case, a special clause, guaranteeing the engineer against an explosion of the engine or the escape of steam was not inserted in the contract, it is appropriate to apply Article 1160 of the Civil Code and to supply in the contract a clause that is customary and is entirely necessary here; ..."

The *Cour de cassation* upheld this decision but on different grounds: "Whereas the challenged decision found finally as a matter of fact that the explosion of the engine on the steam-tug Marie, which caused Teffaine's death, was due to a defect in construction; whereas under Article 1384 of the Civil Code this finding, which excludes the *cas fortuit* and *force majeure*, established the responsibility of the owner of the tug to the victim of the accident, and the owner of the tug cannot avoid this responsibility by proving either the fault of the builder of the engine or the hidden character of the fault in question ... " the decision is affirmed.

**Note.** *Cas fortuit* might be translated as "utter accident" and *force majeure* as "irresistible force" or "act of God." They both describe an event that is unforeseen and completely beyond the plaintiff's power to prevent or avoid. As we will see, they provide a defense to an action under Article 1242 (formerly Article 1384). Two years after this decision, compensation of workers for job-related accidents was dealt with by the Law of April 9, 1898, the "Law Concerning Liability for Accidents of which Workers are the Victims in Their Work." Article 1 provides:

The victim has the right to demand an indemnity from his employer when his work has ceased for more than four days because of accidents that occur because of the performance of work or at work to workers and employees employed in the building trade, in plants, factories, yards, transportation by land or water, loading and unloading, public storehouses, mines, pits, quarries, and also in any employment in which explosives are manufactured or used or in which a machine driven by a force other than human or animal force is customarily used.

Article 2 provides that the victim and his family can only recover under the provisions of this law. Article 3 establishes a scale of indemnities. For example, a worker who is completely incapacitated has the right to a yearly annuity equal to two-thirds of his annual wages.

**Cour de cassation, ch. civ., January 21, 1919, D. 1922.I.25**

“[O]n July 4, 1904 a locomotive ... exploded and caused damage to movable property belonging to Marcault ... [T]he decision [below] found that the cause of the explosion was unknown ... [I]n all events, the hypothesis that some explosive substance was present in the locomotive must be eliminated and ... the explosion is probably to be explained by the fragility of the metal in the locomotive’s fire box ... [T]his fragility was not, however, due to the company’s fault as the locomotive had after construction and subsequent periodic repairs stood up under the regular pressure tests ... [A]fter having passed over articles 1382 and 1383 [now articles 1240 and 1241] of the Civil Code on the ground that a fault on the part of the company was not proved, the decision awarded damages to the plaintiff, holding the company liable, under paragraph 1 of article 1384 [now article 1242], for the damages caused by the explosion ... [I]n so holding, the decision correctly applies this article and does not violate any articles cited in the appeal (pourvoi) ... [I]n sum, the presumption of fault, established by paragraph 1 of article 1384 [now article 1242], on the part of the person who has under his guard the inanimate object causing the damage, can be rebutted only by the proof of a *cas fortuit*, a *force majeure* or a *cause étrangère* that cannot be imputed to him ... [I]t is not sufficient to prove that he did not commit any fault or that the cause of the damage has not been determined ...”

**Note.** *Cause étrangère* might be translated an “extraneous cause.” It is a close cousin to *cas fortuit* and *force majeure*. Again, the defendant escapes liability if he shows that an unforeseen event has placed matters completely out of his control.

**Cour de cassation, ch. civ., November 16, 1920, D. 1920.I.169**

On July 2, 1906, a fire broke out in Bordeaux at the Brienne railroad station of which the defendant, a railroad company, was the lessee. It was fed by casks of rosin stored on the premises. It spread and destroyed the rails, poles, and transmission installation of the plaintiff, another railroad company. The *Cour d’appel* held that the casks were under the “guard” of the defendant but that the defendant was not liable because “the cause of damage must reside in the thing that one has under his guard, must be intrinsic to that thing, that the rosin could not ignite because of an inherent defect ...” The *Cour de cassation* quashed this decision on the ground that “the presumption of fault that arises [under art. 1384] against a person who has an inanimate thing that caused harm under his guard can only be rebutted by proof of *cas fortuit* or *force majeure* or a *cause étrangère* that cannot be imputed to him,” that “it is not sufficient to prove that he did not commit any fault or that the cause of the damage has remained unknown” and that “it is not necessary that the object have an inherent defect capable of causing the damage.”

**Note.** This decision led, due to pressure from the insurance companies, to the insertion by the Law of November 7, 1922 of the following two

paragraphs in Article 1384, now Article 1242, immediately after the first paragraph:

However, a person who is in possession of immovable or movable property in which a fire has started, regardless of the legal basis for his possession, shall not be liable toward third parties unless it is proved that the fire was due to his fault or to the fault of persons for whom he is responsible.

This provision does not apply to the landlord and tenant relation, which remains governed by articles 1733 and 1734 of the Civil Code.

### **Cour de cassation, ch. civ., July 29, 1925, D. 1925.1.5**

On July 11, 1918, Mrs. Bessières was in her store. Suddenly a passing automobile owned by the defendant company jumped the curb, crashed into the store, and injured her. The *Cour d'appel* held that the defendant was not liable because it was not at fault. It had been determined in a separate action that the driver was not at fault and consequently not liable for the accident.

The *Cour de cassation* quashed the decision, saying that "the presumption of fault, established by [art. 1384] as to one who has an inanimate object that has caused damage under his guard cannot be overcome except by proving a *cas fortuit*, a *force majeure*, or a *cause étrangère* not imputable to him." "[I]t does not suffice to prove that he did not commit any fault or that the cause of the damage has not been ascertained."

### **Cour de cassation, Chambres réunies, February 13, 1930, D. 1930.1.57**

On April 22, 1925, a truck belonging to the Compagnie Les Galeries Belfortaises knocked down and injured a child, Lise Jand'heur. The *Cour d'appel* refused to allow her to recover under Article 1384 "on the ground that an accident caused by an automobile in movement, under the impulsion and direction of an individual, does not constitute the act of an object that one has under one's guard within the meaning of art. 1384 as long as it has not been shown that the accident was due to a defect in the automobile."

Judge Le Marc'hadour made a long report to the *Chambres réunies* of the *Cour de cassation*. He said, in part:

"In reality, the defendant argued in conclusion, the system of the decision of the Civil Chamber tends to make the liability almost irrebuttable, to launch in our law the conception of [responsibility for] the risk created, while the courts have always been able to avoid this. Such a system is shocking because it places the careless driver and the careful driver in the same situation; it is unjust because the driver who has not committed any fault will be responsible merely because he cannot show the fault of the victim, and this even when the accident will really have been caused by the victim's fault.

In taking the place of the legislature and in creating a legal system of responsibility for drivers of automobiles, the case law resulting from the decision of 1927 led to consequences that have not been adopted in the laws of various countries which have regulated this question. Thus the German Law of 3 May 1909 and the Austrian Law of 9 August 1908 excluded from their scope automobiles whose speed did not exceed 20 to 25 kilometers an hour while permitting the possessor to prove that the accident was not due to a defect in the vehicle and that they had taken every precaution necessary to prevent the accident. This last formula is that of the Italian Law of 30 June 1912. The English Law of 14 August 1903 makes only those liable who drive with recklessness or lack of care considering the nature of the road and the traffic normally present at the time of the accident.

It is for the reasons which have just been stated that the defendant asks you to reject the appeal (*pourvoi*).

It is not concealed that you are thus requested to depart from a well-established case law; you are asked to say that, if paragraph 1 of article 1384 of the Civil Code is applicable to inanimate objects, the presumption that it establishes contemplates only the act of the object, these words extending to damage resulting from a defect in the object independent of any human intervention or any human act. You have held since your decisions of 1919 and 1920 that article 1384 attaches the responsibility to the guard of the object, not to the object itself. You are now asked to hold, in consequence, that the accident is not the act of the object where the automobile is put in motion by, and is under the direction of, man. You have held the contrary constantly since 1927. This case law does not bind the *Chambres réunies*. From the opposing theses that divide the legal writers and the case law of the courts of appeal you will have to choose the solution to be followed in the future."

The *Procureur général* Paul Matter also made a long statement to the court. He argued for quashing of the decision below: "[T]he *Chambres réunies* is not at all, so far as I know, a jurisdiction of great changes. It follows – this is the greatest of our traditions – the totality of the general movement, recognizing and accepting the advances and thus completing the whole case law ...

Does this case law exceed the terms of the written law? Not at all. This case law has sought its principle and its basis in an article of the law. In addition, it can be said that this case law adapted to new needs an article of which the preceding decisions had not seen the full scope, and this is also in our tradition. Perhaps it would be appropriate to recall here the thought of a great judge on this matter when he said that the case law performs a creative function; that faced by all the changes in ideas, in mores, in institutions, in the economic situation of France, it is necessary to adapt in a liberal, humane spirit the text to the realities and requirements of modern life. Have you ever failed to perform this task? ...

The first paragraph of article 1384 was enacted in a much earlier era, in a period of stagecoaches and one-horse chaises, but at a time when they knew how to draft a statute not only for that time, not only for the needs of

the moment, but for the future. These provisions, some taken from our ancient law, some from Roman law, others from the customary law, others from the written law, have the immense advantage of stating general principles. Whenever one talks with a foreign lawyer, and discusses with him the scope of an article of our Civil Code, especially in its title 'On Obligations,' he always expresses his profound admiration for those articles which contain formulae so supple and yet at the same time so precise, so large and so comprehensive that, formulated at the time of the horse-drawn carriage, they are equally applicable to the automobile and even to the airplane."

The *Chambres réunies* quashed the decision below. It said that "the presumption of responsibility established by that article as to one who has an inanimate object that has caused harm to another under his guard can be rebutted only by proving a *cas fortuit*, a *force majeure*, or a *cause étrangère* that cannot be imputed to him." "[T]he law does not distinguish, whether the object that caused the harm was or was not put in motion by man for purposes of applying the presumption that it has established."

**Note.** Liability for motor vehicle accidents is now covered by special legislation. The Law of December 31, 1951 (Law no. 51–1508) established a "guarantee fund" from which the plaintiff could recover for physical injury, though not pain and suffering, when the person liable to them is unknown or has insufficient assets. Its funds are contributed by member insurance companies, by motorists who buy liability insurance, and by uninsured motorists held liable for traffic accidents. By 1957, the fund was running a deficit of six million francs. To limit charges, a mandatory insurance program was enacted in 1958 (Law no. 58–208 of February 27, 1958). With certain exceptions, all those who might be liable for damages caused by a motor vehicle are required to buy liability insurance from a private company. Then, in a decision that was widely regarded as a piece of judicial legislation, the *Cour de cassation* held that a defense of contributory negligence was never available to a motorist, not even if the victim's negligence made the accident so unforeseeable or avoidable that would otherwise constitute *cas fortuit*, *force majeure*, or *cause étrangère*. (Cass., 2nd Civ. Ch., July 21, 1982, D. 1982.449) The French legislature responded by enacting the Law of July 5, 1985. It provides that when a traffic accident has resulted in personal injury or death, *force majeure* and kindred defenses are not available. The defense of contributory negligence is available against other motorists (who can protect themselves by a special and very popular type of insurance) but, with certain exceptions, not against victims who are not motorists unless their fault was "inexcusable" and the "exclusive cause" of the accident. Many believe it is "a law about indemnification and not responsibility." F. Terré, P. Simler, Y. Lequette, and F. Chénéde, *Droit civil Les obligations* (12th edn., 2019), § 1165.

### iii. The Requirement of an "Act of an Object"

In reading this section and the section that follows, which deals with *cas fortuit*, and *force majeure*, consider to what extent the court's decisions

really have nothing to do with fault, or whether they concern the sort of actions for which a person is usually at fault.

**Cour de cassation, ch. req., April 16, 1945, S. 1945.I.73**

Birraux sought to recover damages from Christin, alleging that the latter had hit him on the head with an iron bar. In order to avoid the three-year period of prescription that applies to claims based on Article 1382, Birraux sought unsuccessfully to rest the action on Article 1384(1). The court held that Article 1384(1) is not applicable because the damage was “caused by a personal act of the defendant,” the iron bar being “only a simple instrument obedient to his hands.”

**Cour de cassation, 2<sup>e</sup> ch. civ., July 15, 1962, Gaz. Pal. 1965.II.330**

A bicyclist hit Mrs. Pellerin, who, having gotten out of her husband's car, was closing the door. The bicyclist was thrown to the ground and died. In the court below, Mr. Pellerin, as the guardian of the car, was held liable for a portion of the resulting damage. The *Cour de cassation* quashed the judgment “because, it having been found that the collision which brought about Bahurel's fall was between the bicycle and Mrs. Pellerin who, standing on the street, did not form a whole (*ensemble*) with the automobile, the judge below could not conclude that the car was the instrument of the damage and that its guardian was liable for damages on the basis of article 1384(1).”

**Note.** A note to the decision points out that, if the person closing the door had been in the car, Article 1384(1) would presumably have been applied. In a case in which the body of one motorcyclist struck the body of another in passing, causing an accident, the *Cour de cassation* held Article 1384(1) applicable. Cass., ch. civ., 2d sect., Gaz. Pal. 1963.I.25.

**Tribunal de grand instance, Lyon, February 24, 1971, J.C.P. II.16822**

The defendant skier passed, at a high speed, very close to the plaintiff skier, who fell either because of fear and surprise or due to an actual physical contact. The defendant was held liable, the court reasoning, in part, that since “nothing turns on whether Mrs. Briday's fall was caused by the sight of the skier coming very close rather than by the sight of his skis, one must treat the skier and his skis as forming an ensemble, a whole with its own dynamism. The movement of the skier depends so closely on his skis that, even if his body alone caused the emotion that brought about the fall, his skis were certainly the instrument of the damage . . . .”

**Cour de cassation, 2<sup>e</sup> ch. civ., March 13, 1967, [1967] Bull. civ. no. 120**

After being passed by the defendant's automobile, the plaintiff's car left the road and the driver and car were injured. An action for damages



based on Article 1384(1) was rejected below. The appeal (*pourvoi*) urged that “as the cause of the accident was unknown, the [defendant] must be held entirely responsible.” The *Cour de cassation* upheld the decision below. “[E]very person driving on a road must expect to be passed by another vehicle and a wrong maneuver on his part has no relation with the passing unless it is established that this takes place under irregular conditions.” Accordingly, the plaintiff “has not furnished proof – the burden of which, in the absence of contact between the two vehicles, rests upon him – of the participation of the [defendant’s] vehicle in bringing about the damage.”

**Cour de cassation, ch. civ., February 24, 1941, D.C. 1941.J.85**

The plaintiff alleged that her minor son fell over a folding chair when crossing the terrace of the Pialet Café one evening in order to enter the establishment. She claimed that the café was liable under Article 1384. The *Cour de cassation* upheld her recovery below. It said: “in establishing a presumption of responsibility against the guardian of an object whose act has caused damages, a presumption which is not rebutted unless the guardian proves that the act could neither have been foreseen nor prevented by him, article 1384 does not make a distinction depending upon whether the object is inert or moving.” “[I]t is sufficient, for the guardian’s liability to arise, that it be proven that the object is, in some measure, the cause of the damage which, without it, would not have occurred . . . .”

**Cour de cassation, 2e ch. civ., November 19, 1964, J.C.P. 11.1965. 14022**

A shopper slipped on the floor of a store, injuring herself. She brought an action against the store relying on Article 1384. The *Cour de cassation* held that the defendant was not liable because the plaintiff “had not shown that the covering of the floor of the Monoprix department store was the generating cause (*cause génératrice*) of the harm.”

**Cour de cassation, 2e ch. civ., March 20, 1968, [1968] Bull. civ. 1968. II. no. 89**

The victim was injured by walking into a glass door. Having lost before the *Cour d’appel*, the plaintiff argued that that court should have considered whether, so far as the store was concerned, the accident was “unforeseeable and irresistible.” The *Cour de cassation* found for the defendant. It noted that the *Cour d’appel* had “found that the door was marked by two metal edges and by a handle of gilded metal, that it was closed and that Mrs. Serignan had opened it in order to enter the store . . . .” “[F]rom these findings the *Cour d’appel* could conclude that the door had only submitted to an alien action of the victim, a conclusion which made it unnecessary to investigate whether the victim’s act had the character of *force majeure*.”

**Cour de cassation, ch. civ., March 5, 1947, D. 1947.J.296**

At 3:00 A.M., Biro drove his car into Taupin's truck which was parked by the curb. The court found that the truck required lighting. The lighting had been checked by the police forty minutes before the accident. Nevertheless, the court found that it was impossible to know if the lighting was functioning at the time of the accident. The court held that the *Cour d'appel* was correct to conclude that "the cause of the accident was unknown' [and therefore] the presumption of responsibility established by article 1384(1) of the Civil Code operated as to each of the two guardians and that each was liable for the damage caused to the other by the collision." "[O]f course, the guardian of an object that has intervened in the realization of damage can avoid the presumption of responsibility that rests upon him by proving that his object, inert or not, only played a passive role and only suffered a separate force which produced the damage; but ... a vehicle parked at night on a public road, even though it is placed at the curb, cannot be considered as in a normal situation unless it is provided with the required lighting capable of revealing to others the obstacle that its presence represents; ... if the guardian does not prove this circumstance, the legal presumption continues, since there is no basis for affirming that the vehicle struck suffered the shock that caused the damage without having caused or facilitated it and that, in consequence, its role was entirely passive ... ."

**Cour de cassation, 2e ch. civ., March 29, 1971, J.C.P. 1972.II.17086**

The plaintiff was sitting on a branch of a tree, picking the tree's fruit with the owner's permission, when the branch broke. The *Cour d'appel* held for the plaintiff because the defendant could not show that he was "an unforeseeable and irresistible fault." The decision was quashed by the *Cour de cassation* on the ground that "in deducing from the sole finding of the branch's breaking that the tree was the instrument of the damage, the *Cour d'appel* failed to give a legal basis to its decision." In a note to the decision, Boré remarked that "with respect to the burden of proof, the decision seems to accept a judicial tendency, which has discretely manifested itself on several occasions, to require the victim to prove the abnormal use of the object which is inert at the moment of damage and was simply subject to an alien action."

**iv. *Cas Fortuit* and *Force Majeure*****Cour de cassation, 2e ch. civ., March 19, 1956, D. & S. 1956.J.349**

The plaintiff was injured by a ricocheting bullet fired by a fellow hunter. The *Cour d'appel* held for the defendant on the ground that the character of the ground thus relied upon was "general and absolute." In the view of the *Cour de cassation*, "the ricochet of a bullet during a hunting expedition does not constitute a *cas fortuit* or *force majeure*, unless the circumstances of the case indicate the contrary."

**Cour de cassation, ch. civ., December 9, 1940, D. A. 1941.J.33**

During a hunting expedition, Guilbert's right eye was injured by a ricocheting bullet that Neveu fired at a rabbit climbing up on an embankment two feet in height. The *Cour d'appel* held that Neveu was not liable under Article 1384 because the event was a *cas fortuit*. The *Cour de cassation* upheld this decision on the ground that, as the *Cour d'appel* had found, Neveu "had done an act normal in hunting" and Guilbert "was not in his direct line of fire, but at least 25 meters to his left." Neveu therefore was unable to "foresee that the bullet would ricochet in the direction of his hunting companion" and consequently, the accident was "unforeseeable and unpreventable."

**Trib. Civil of Chartres, June 18, 1941, D.A. 1942.J.13**

"Fillon . . . must be held responsible as guardian of his gun as he does not prove that this accident was either a *cas fortuit* or a case of *force majeure*. Even if it is admitted that the bullet hit Mauté after ricocheting, the ricochet cannot be considered a *cas fortuit* as Fillon committed an imprudence in firing close to a road, where the ground was hard, and where there were a pole and apple trees that could have caused the ricochet."

**Cour d'appel, Paris, October 28, 1943, Gaz. Pal. 1943.II.269**

"The icy condition of a road can, in certain circumstances, constitute a *cas fortuit* when, the condition arising suddenly, the roads are very quickly rendered dangerous. However, it is not shown that the icy condition that caused this accident arose unexpectedly and could not have been foreseen . . . [T]he report of the accident prepared by the police of Gaguy states that the ground was covered with frozen snow . . . Therefore, there is no question of an icy condition that developed suddenly and could not have been foreseen. Instead, . . . the icy condition was already of the law present, that is to say, had existed for some time in the area traversed by the road. Indeed, the melting of the ice was prevented by a wall that shaded the road from the sun. Hence, a prudent driver could have foreseen the icy condition."

**Cour de cassation, 2<sup>e</sup> ch. civ., June 29, 1966, D. & S. 1966.J.645**

A car skidded on a patch of ice, the driver lost control, and a pedestrian was killed. The victim's widow sought to recover damages under Article 1384(1). The court held for the defendant on the ground that the formation of a patch of ice on a highway when the temperature is just below freezing is normally unforeseeable.

**v. "Guard"**

**François Terré, Philippe Simler, Yves Lequette, and François Chénéde, *Droit civil Les obligations* (12th edn., 2019), § 1011**

"[T]he owner of an object can *lose his status as its guardian without losing that of owner*. That is the case, notably, in all instances where there

is a *transfer of guard* of an inanimate thing, as in contracts of rental, loan, deposit, transport of goods, and so forth: the guard belongs to the renter, borrower, depositary or transporter . . . Still it should be noted that both subjective and objective facts affect the transfer of guard so that even when it occurs by agreement it does not invariably create obligations for a third party, and the situation arising as to him may be the opposite under certain conditions. Here, the *Cour de cassation* has said that the owner of an object only ceases to be responsible for it when the third party has received correlatively every possibility of himself preventing the harm that the object may cause which means that an enterprise that wishes to transfer its guard has an obligation to inform the other contracting party in an adequate manner.”

**Cour de cassation, 1<sup>e</sup> ch. civ., June 11, 1953, J.C.P. 1953.II.7825**

“[T]he presumption of responsibility that rests upon the guardian of an object that has caused damage is based on the obligation of guard, the corollary of the powers of use, direction, and control that characterize the guardian . . . [A] person who has rented an object, and who has thus become its new guardian, assumes as to third parties from then on the risks of damage even if the damage is caused by an inherent defect in the object, subject only to such recourse as he may have against the person from whom the object is rented . . . [T]herefore, the driver to whom an automobile is turned over under a contract of hire is legally the guardian during the existence of the contract, without his being able to object that the guard of the car remained with the owner because the accident was caused by a defect in the car . . . [H]olding that Bouchaid must be presumed to be liable for an accident suffered by Schneider while he was being transported in a car owned by Bouchaid, and which had been rented to Lugassy, on the ground that, as the accident was due to defects in the car, Bouchaid had retained the guard, the *Cour d'appel* gave a judgment for Schneider of 336,350 francs damages . . . But . . . as a consequence of the contract of hire, the guard of the car was transferred to Lugassy who had the use, direction, and control, and the defect in the object cannot create a presumption of responsibility against Bouchaid, as this presumption rests upon Lugassy alone as the guardian . . .”

**Note on Who Has “Guard.”** Normally, then, if someone other than the owner has control over an object, that person has “guard” of it rather than the owner. A parking lot attendant has “guard” of the owner’s automobile while he is parking it. Cass, 2nd Civ. Ch., Oct. 13, 1965, J.C.P. 1966. II.14503. A thief has “guard” of a car he has stolen. Cass., Ch. réunies, Dec. 2, 1941, D. 1941.J.369. Nevertheless, an employer does not transfer the “guard” of an object by allowing his employee to use it for business purposes; the employee does have “guard” of it if he uses it for purposes of his own. Cass., ch. req., Oct. 8, 1940, Gaz Pal. 1940.2.65.

Some commentators have argued that the courts should distinguish guard of the object’s structure from guard of its conduct. If a person rents an object, the owner should be liable if an accident occurs because the

object is defective; the renter should be liable if the object is not but goes out of control. B. Goldman, *De la détermination du gardien responsable du fait des choses inanimées* (1947), 208. In the last case, the decision of June 11, 1953, this distinction was squarely rejected by the *Cour de cassation*. As the cases that follow show, while the courts have not accepted such a distinction, they have sometimes managed to hold that guard did not pass despite physical delivery.

**Cour de cassation, 1<sup>e</sup> ch. civ., June 9, 1993, J.C.P. 1994.II.22202**

After a grain silo exploded, the company owning the silo, *Société La Malterie de la Moselle*, hired other companies, the *Sociétés Cardem et Somafer*, to demolish the structure and haul off the rubble. They did so, dumping the rubble in a ravine near the reservoir that supplied water to the town of Montigny-les-Metz. Some time later, the town officials discovered traces of fermented barley were mixed in with the debris, creating a risk of pollution. They stopped using the reservoir and bought water for the town from another source. They then sought to recover their expenses from whichever companies were liable to them.

“[T]he responsibility for harm caused by the act of a thing is tied to the exercise of the powers of surveillance and control which characterize having guard of it . . . [A]side from the effect of valid provisions to the contrary between the parties, the owner of a thing, even after entrusting it to a third party, does not cease to be responsible unless it is established that the third party received correlatively every possibility of himself preventing the harm that the object may cause . . .

[T]o maintain that the *Société La Malterie de la Moselle* no longer had guard of the debris containing the barley and that the *Société Cardem* became the guardian, the opinion [of the lower court] stated that the latter had assumed responsibility for the removal of the rubble by the terms of the agreement with the *Société La Malterie de la Moselle*, and that the grains of barley suffered from no particular defect except that arising from their nature . . . [G]iven that the *Société La Malterie de la Moselle*, owner of the rubble and of the barley, could not, being professionals, be ignorant of the risk presented by the barley, a substance subject to a dangerous fermentation, and yet failed to draw the attention of *Société Cardem* to this risk, which was one it would not normally contemplate, the *Société La Malterie de la Moselle* therefore retained its guard of the thing which was the instrument of damage, and, in ruling as it did, the *Cour d'appel* failed to draw the proper legal consequences from these fact and violated the text [of art. 1384] . . . .”

**Cour de cassation, ch. comm., June 30, 1953. J.C.P. 1953.II.7811**

A railroad was held not to be liable under Article 1384 for the damage caused by the explosion of bottles of compressed gas that it was transporting. The cause of the explosion had been established as a defect in the bottles of which the railroad had no knowledge.

**Cour de cassation, 2<sup>e</sup> ch. civ., June 15, 1972, Bull. civ. 1982 no. 186**

“[T]he responsibility for damage caused by an inanimate object is linked to the use that is made of the object, as well as to the power of supervision and control exercised over it, which characterize having guard of it . . . [I]t appears from the decision [below] that Mrs. Jonquières, who had been injured in her eye by the explosion of a phial of medicine manufactured by the *Société des Laboratoires Novalis* and contained in a box which had been given to her by an employee of Dr. Vitel, sought to recover damages from that company and from its insurer . . . and, on appeal, also from Dr. Vitel, who had been brought into the action by the defendants . . . [A]ccording to the findings of the judgment [below], the product in question was delivered by the *Société* to Dr. Vitel no later than December, 1955 . . . [T]he accident occurred in January 1967 . . . [T]he informational material accompanying the product specified its great instability, indicated by the solution turning more or less markedly yellow . . . [N]either the doctor nor the nurse opened the box in order to determine the medicine’s condition, the improper state of which would have been revealed by inspecting the appearance of the contents of the phial and by reading the notice . . . [I]t follows that in declaring that, at the moment when occurred, the *Société des Laboratoires Novalis* had the power which characterizes the guard of this sample, the *Cour d’appel* did not draw the legal consequences that are appropriate . . .”

**vi. The Extent of Liability**

If both parties have “guard” of an object, and the object of each party harms the other, some French jurists believe that neither should be able to rely on Article 1242, formerly Article 1384, and that each should bear his own harm unless he can prove that the other was at fault. But that is not how French courts see the matter. They hold each party liable for the damage he does to another. F. Terré, P. Simler, Y. Lequette, and François Chénédé, *Droit civil Les obligations* (12th edn., 2019), § 1096.

The defendant’s liability is not affected by the fact that he was not at fault. For example, he is still liable if the harm was due to the fact that he had an epileptic fit and so lost control of the object under his guard. Cass., 2e ch. civ., Dec. 18, 1964, D. & S. 1965.J.191. Similarly, even before the law of January 3, 1968 imposed liability on the insane, the *Cour de cassation* had held that an insane person is liable under Article 1384. Cass., 2e ch. civ., Dec. 18, 1964, D.S. 1965.J.191. The same day that it held that children are liable under Articles 1382–3 for acts they could not help on account of their age, it held that they are also liable under Article 1384. Cass., ass. plén., May 9, 1984 (3rd case), D.S. 1984.J.529 (three year old child has “guard” of a stick with which he struck a playmate in the eye).

As we have seen, however, the defendant escapes liability if the court decides the harm was done by *force majeure* or *cas fortuit*. The defendant may be completely exonerated. Or he may be exonerated only partially so



that he pays for only a portion of the harm that the plaintiff suffered. Cass., ch. civ., June 19, 1951, D. 1951.J.717.

If the plaintiff's conduct is sufficiently unforeseeable, it may itself count as *force majeure* or *cas fortuit* and hence serve to exonerate the defendant wholly or partially. That is particularly likely to be the case if the victim was at fault. In 1982, in a celebrated decision, the *Cour de cassation* took the opposite view. Cass., 2e ch. civ., July 21, 1982, D. 1982.449. The court was concerned about traffic accidents. It believed that a driver should be fully liable even if the party injured was at fault. Partly in response to this decision, the legislature enacted the Law of July 5, 1985 which made traffic accidents the subject of a special regime so that the driver would no longer be liable under Article 1384. Article 3 of this law provided that the driver is liable even if the injured party is not at fault as long as his fault is not "inexcusable." With the problem solved, the law returned to its traditional position that the fault of the plaintiff can wholly or partially exonerate the guardian. Cass., 2e ch. civ., Apr. 6, 1987, D.S. 1988.32.

### c. Liability for Defective Products

#### Law in the United States

#### **Escola v. Coca-Cola Bottling Co. of Fresno, 150 P.2d 436 (Cal. 1944)**

A bottle of Coca-Cola exploded in the plaintiff's hand as she was placing it in a refrigerator as part of her job as a waitress. The majority of the California Supreme Court held that the jury could properly find the defendant had been negligent in manufacturing the bottle. Judge Traynor concurred on a different ground: "I concur in the judgment, but I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. *MacPherson v. Buick Motor Co.* established the principle, recognized by this court, that irrespective of privity of contract, the manufacturer is responsible for an injury caused by such an article to any person who comes in lawful contact with it. In these cases the source of the manufacturer's liability was his negligence in the manufacturing process or in the inspection of component parts supplied by others. Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products

having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

The injury from a defective product does not become a matter of indifference because the defect arises from causes other than the negligence of the manufacturer, such as negligence of a sub-manufacturer of a component part whose defects could not be revealed by inspection, or unknown causes that even by the device of *res ipsa loquitur* cannot be classified as negligence of the manufacturer. The inference of negligence may be dispelled by an affirmative showing of proper care. If the evidence against the fact inferred is 'clear, positive, uncontradicted, and of such a nature that it cannot rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law.' An injured person, however, is not ordinarily in a position to refute such evidence or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is. In leaving it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability. It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence. If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly."

### **Restatement (Second) of Torts**

#### **§ 402A SPECIAL LIABILITY OF SELLER OF PRODUCT FOR PHYSICAL HARM TO USER OR CONSUMER**

- (1). One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
  - (a). the seller is engaged in the business of selling such a product, and
  - (b). it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2). The rule stated in Subsection (1) applies although
  - (a). the seller has exercised all possible care in the preparation and sale of his product, and
  - (b). the user or consumer has not bought the product from or entered into any contractual relation with the seller.

*Caveat:* The Institute expresses no opinion as to whether the rules stated in this Section may not apply (1) to harm to persons other than users or consumers; (2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or (3) to the seller of a component part of a product to be assembled.

**Note.** Despite the first of these “caveats,” virtually all American states now impose liability for harm to persons who were neither users nor consumers of the product.

**Official Comments to § 402A.**

*f. Business of selling.*

The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. It is not necessary that the seller be engaged solely in the business of selling such products. Thus the rule applies to the owner of a motion picture theater who sells popcorn or ice cream, either for consumption on the premises or in packages to be taken home.

The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business. Thus it does not apply to the housewife who, on one occasion, sells to her neighbor a jar of jam or a pound of sugar. Nor does it apply to the owner of an automobile who, on one occasion, sells it to his neighbor, or even sells it to a dealer in used cars, and this even though he is fully aware that the dealer plans to resell it. The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods. This basis is lacking in the case of the ordinary individual who makes the isolated sale, and he is not liable to a third person, or even to his buyer, in the absence of his negligence . . .

*g. Defective condition.*

The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.

Safe condition at the time of delivery by the seller will, however, include proper packaging, necessary sterilization, and other precautions required to permit the product to remain safe for a normal length of time when handled in a normal manner.

*h.*

A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling,

as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable. Where, however, he has reason to anticipate that danger may result from a particular use as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger (see Comment j), and a product sold without such warning is in a defective condition.

i. *Unreasonably dangerous.*

The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by “unreasonably dangerous” in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

k. *Unavoidably unsafe products.*

There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are specially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably dangerous*. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of

such products, again, with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

**Note.** Suppose a product met state-of-the-art safety standards at the time it was designed and manufactured but, because technology has advanced, would not do so at the time of trial. The dominant view is that what matters is the state-of-the-art when the product was designed and manufactured. See *Bruce v. Martin Marietta Corp.*, 544 F.2d 442 (10th Cir. 1976).

**Brown v. Superior Court (Abbott Laboratories), 751 P.2d 470 (Cal. 1988)**

Plaintiffs sued the defendant drug manufacturers who had produced DES, a drug which they claimed had been taken by their mothers to prevent miscarriage. They alleged that the drug was defective and had injured them before birth. The court denied their claim.

“Comment k [of Restatement § 402A] has been analyzed and criticized by numerous commentators. While there is some disagreement as to its scope and meaning, there is a general consensus that, although it purports to explain the strict liability doctrine, in fact the principle it states is based on negligence. That is, comment k would impose liability on a drug manufacturer only if it failed to warn of a defect of which it either knew or should have known. This concept focuses not on a deficiency in the product – the hallmark of strict liability – but on the fault of the producer in failing to warn of dangers inherent in the use of its product that were either known or knowable – an idea which ‘rings of negligence,’ in the words of Cronin [v. J.B.E. Olson Corp.], 501 P.2d 1153 (1972).

Comment k has been adopted in the overwhelming majority of jurisdictions that have considered the matter . . .

We shall conclude that (1) a drug manufacturer’s liability for a defectively designed drug should not be measured by the standards of strict liability; [and] (2) because of the public interest in the development, availability, and reasonable price of drugs, the appropriate test for determining responsibility is the test stated in comment k; . . .

Perhaps a drug might be made safer if it was withheld from the market until scientific skill and knowledge advanced to the point at which additional dangerous side effects would be revealed. But in most cases such a delay in marketing new drugs – added to the delay required to obtain approval for release of the product from the Food and Drug Administration – would not serve the public welfare. Public policy favors the development and marketing of beneficial new drugs, even though some

risks, perhaps serious ones, might accompany their introduction, because drugs can save lives and reduce pain and suffering.

If drug manufacturers were subject to strict liability, they might be reluctant to undertake research programs to develop some pharmaceuticals that would prove beneficial or to distribute others that are available to be marketed, because of the fear of large adverse monetary judgments. Further, the additional expense of insuring against such liability – assuming insurance would be available – and of research programs to reveal possible dangers not detectable by available scientific methods could place the cost of medication beyond the reach of those who need it most.”

### Law in Europe

**European Community Council Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products 32 I.L.M. 1347, Official Journal of the European Communities, L 210/29–33, August 7, 1985**

Whereas approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary because the existing divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property;

Whereas liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production; . . .

Whereas protection of the consumer requires that all producers involved in the production process should be made liable, in so far as their finished product, component part or any raw material supplied by them was defective; whereas, for the same reason, liability should extend to importers of products into the Community and to persons who present themselves as producers by affixing their name, trade mark or other distinguishing feature or who supply a product the producer of which cannot be identified; . . .

Whereas, to protect the physical well-being and property of the consumer, the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of the safety which the public at large is entitled to expect; whereas the safety is assessed by excluding any misuse of the product not reasonable under the circumstances;

Whereas a fair apportionment of risk between the injured person and the producer implies that the producer should be able to free himself from liability if he furnishes proof as to the existence of certain exonerating circumstances;



Whereas the protection of the consumer requires that the liability of the producer remains unaffected by acts or omissions of other persons having contributed to cause the damage; whereas, however, the contributory negligence of the injured person may be taken into account to reduce or disallow such liability;

Whereas the protection of the consumer requires compensation for death and personal injury as well as compensation for damage to property; whereas the latter should nevertheless be limited to goods for private use or consumption and be subject to a deduction of a lower threshold of a fixed amount in order to avoid litigation in an excessive number of cases; whereas this Directive should not prejudice compensation for pain and suffering and other non-material damages payable, where appropriate, under the law applicable to the case; . . .

Whereas products age in the course of time, higher safety standards are developed and the state of science and technology progresses; whereas, therefore, it would be reasonable to make the producer liable for an unlimited period for the defectiveness of his product; whereas, therefore, liability should expire after a reasonable length of time, without prejudice to claims pending at law; . . .

#### ARTICLE 1

The producer shall be liable for damage caused by a defect in his product.

#### ARTICLE 2

For the purpose of this Directive “product” means all movables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable. “Primary agricultural products”, means the products of the soil, of stock-farming and of fisheries, excluding products which have undergone initial processing. “Product” includes electricity.

#### ARTICLE 3

- (1). “Producer” means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.
- (2). Without prejudice to the liability of the producer, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer.
- (3). Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer

referred to in paragraph 2, even if the name of the producer is indicated.

#### ARTICLE 4

The injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage.

#### ARTICLE 5

Where, as a result of the provisions of this Directive, two or more persons are liable for the same damage, they shall be liable jointly and severally, without prejudice to the provisions of national law concerning the rights of contribution or recourse.

#### ARTICLE 6

- (1). A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:
  - (a). the presentation of the product;
  - (b). the use to which it could reasonably be expected that the product would be put;
  - (c). the time when the product was put into circulation.
- (2). A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

#### ARTICLE 7

The producer shall not be liable as a result of this Directive if he proves:

- (a). that he did not put the product into circulation; or
- (b). that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards; or
- (c). that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business; or
- (d). that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or
- (e). that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered; or
- (f). in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.

#### ARTICLE 8

- (1). Without prejudice to the provisions of national law concerning the right of contribution or recourse, the liability of the producer shall

not be reduced when the damage is caused both by a defect in product and by the act or omission of a third party.

- (2). The liability of the producer may be reduced or disallowed when, having regard to all the circumstances, the damage is caused both by a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible.

#### ARTICLE 9

For the purpose of Article 1, “damage” means:

- (a). damage caused by death or by personal injuries;
- (b). damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500 ECU, provided that the item of property:
  - (i). is of a type ordinarily intended for private use or consumption, and
  - (ii). was used by the injured person mainly for his own private use or consumption.

This Article shall be without prejudice to national provisions relating to non-material damage...

#### ARTICLE 15

- (1). Each Member State may: ...
- (b). by way of derogation from Article 7 (e), maintain or, subject to the procedure set out in paragraph 2 of this Article, provide in this legislation that the producer shall be liable even if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered ...

#### ARTICLE 16

(1) Any Member State may provide that a producer’s total liability for damage resulting from a death or personal injury and caused by identical items with the same defect shall be limited to an amount which may not be less than 70 million ECU ...

#### ARTICLE 19

(1) Member States shall bring into force, not later than three years from the date of this Directive, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof. ...

### Chinese Law

### Chinese Civil Code

#### BOOK VII TORT LIABILITY

#### CHAPTER IV PRODUCT LIABILITY

#### ARTICLE 1202

A manufacturer shall be liable in tort if its product causes damage to others due to a defect.

ARTICLE 1203

In the event of damage arising from a defective product, the person harmed may seek compensation from either the manufacturer or seller of the product. If the product defect is caused by the manufacturer, the seller shall be entitled to seek reimbursement from the manufacturer after paying compensation. If the product defect is caused through the fault of the seller, the manufacturer shall be entitled to seek reimbursement from the seller after paying compensation.

ARTICLE 1204

If a product defect is caused through the fault of a third party, including, *inter alia*, the transporter or the party providing storage, and results in damage to others, the manufacturer or seller of the product shall be entitled to seek reimbursement from the third party after paying compensation.

ARTICLE 1205

If a defective product endangers the personal or property safety of others, the person endangered shall be entitled to request that the manufacturer or seller be held liable in tort. The remedies shall include, *inter alia*, injunction, removal of the obstacle and elimination of the danger.

ARTICLE 1206

If a defect is found in a product after it has been put into circulation, the manufacturer and the seller shall take remedial measures in a timely manner including, *inter alia*, cessation of sales, alerts and recalls. In the event of damage arising from a failure to take remedial measures in a timely manner or inadequate remedial measures, they shall be liable for the consequential damages.

When product is being recalled, the manufacturers and sellers shall be responsible for the necessary expense of the victims.

ARTICLE 1207

In the event of death or serious damage to health arising from a product that continues to be manufactured or sold when it is known to be defective or when the tortfeasor failed to take remedial measures that have been mentioned, the victim shall be entitled to claim proportionate punitive damages.

## 5. “Liability in Equity” in Chinese Law

Chinese law, like Western law, recognizes three grounds for liability in tort: intention, negligence, and, in exceptional cases, strict liability. Unlike Western law, it recognizes a fourth as well, translated here as “liability in equity.” This principle first appeared in Article 132 of the General Principles of Civil Law (GPCL), which provides that “[w]here no party was at fault in resulting in the harm, civil liability can be, according to

the actual situations, shared among the parties.”<sup>1</sup> It was rephrased in Article 24 of the Tort Liability Law (TLL):

### Tort Liability Law of the People’s Republic of China

#### ARTICLE 24

Where neither the victim nor the actor is at fault for the occurrence of a damage, both of them may share the damage based on the actual situation.

### Chinese Civil Code

#### ARTICLE 1186

Where neither the victim nor the actor is at fault for the occurrence of a damage, both of them may share the damage according to law.

**Note.** It is unclear how the new wording will change the law. It would appear that it says sharing the loss when no one is at fault is mandated by law. Such a liability might become mandatory instead of discretionary. One commentator is saying the opposite, the idea behind the change is to limit the use of the doctrine rather than mandating it.<sup>2</sup>

One root of this principle is in the traditional Chinese concern, mentioned earlier, between with what Aristotle would have called distributive justice as opposed to commutative justice. Distributive justice is concerned with whether a fair share of wealth is possessed by each person. Commutative justice is concerned with fairness in transactions between one person or another, whether voluntary, when they exchange resources, or involuntary, when one person deprives another of resources against his will. “Liability in equity” blurs this distinction. The tendency goes far back in Chinese history. In the chapter on the law of punishment of Han Shu (汉书), a leading historical account of the West Han Dynasty, it was pointed out that a sound governance policy should support the weak and suppress the strong (扶弱抑强).<sup>3</sup> Hai Rui (海瑞), perhaps the best known judge in imperial China, explained that in adjudicating cases in which the result was otherwise indeterminable:

I suggest that in returning verdicts in those cases it is better to rule against the younger brother rather than the older brother, against the nephew rather than the uncle, against the rich rather than the poor, and against the stubbornly cunning rather than against the clumsily honest. If the case involves a property dispute, it is better to rule against a member of the gentry rather than the commoner so as to provide relief to the weaker side. But if the case has to do with courtesy and status, it is better to rule against the commoner rather than against the gentry: the purpose is to maintain our order and system.<sup>4</sup>

1. GPCL, art. 132.

2. 周友军 《民法典侵权责任编的制度发展》 [Zhou Youjun, *The Institutional Development of Civil Code Book on Tort Liability*] <https://mp.weixin.qq.com/s/dKpr6wAwqbZwl3C1KWQntQ> (accessed June 2, 2020).

3. See *Book of Han Dynasty, Chapter of Punishment* [汉书 刑罚志].

4. Ray Huang, *1587: A Year of No Significance: The Ming Dynasty in Decline* (New Haven, 1981), 131.

Another quite different historical root of the principle was the socialist legal tradition of the Union of Soviet Socialist Republics. Articles 403–5 of the Russian Civil Code provided for liability based on fault and strict liability for, e.g., ultra-hazardous activities. Article 406 of the Russian Civil Code of 1922 provided that: “[i]n situations where, in accordance with Articles 403–405, the person causing the injury is not under a legal duty to make compensation, the court may nevertheless compel him to do so for the harm, depending on his financial position and that of the person injured.”

In China, there are a few unstated rules regarding how liability in equity should be applied. Scholars emphasize that the loss shall be fairly allocated.<sup>5</sup> The wording “actual situations” of Article 132 GPCL and Article 24 TLL, according to the interpretation of the commentary published by the Supreme Court, refers to the comparison between the financial status of the victim and the alleged tortfeasor.<sup>6</sup> The allocation of liability is thus based upon the financial status of the parties,<sup>7</sup> and directly related to their respective “ability to shoulder the loss.”<sup>8</sup> Yet a person cannot be liable in equity for some losses for which he can be liable if he was at fault, such as pain and suffering and punitive damages.<sup>9</sup>

It is controversial whether liability in equity is grounded on a legal duty or a moral one.<sup>10</sup> It has been argued that this form of liability is one of “moral assistance”<sup>11</sup> that is “based on the charitable moral feeling of certain people.”<sup>12</sup> According to this view, liability in equity cannot be imposed by law, but should be the result of a voluntary agreement between the parties.<sup>13</sup> Under the leading opinion, however, liability in equity is still a legal duty with a socialist moral foundation.<sup>14</sup> It is argued that although the obligation to assume this liability is based on law rather than upon the parties’ agreement, judges have the discretion to impose this liability when the situation warrants its application.<sup>15</sup> Also, this liability should be limited to circumstances expressly stipulated by law.<sup>16</sup> Such circumstances include harms caused by people with limited or no civil capacity where such persons have property,<sup>17</sup> or harms caused by people with full civil capacity but under temporary loss of consciousness,<sup>18</sup> or harms caused by objects thrown out of a building or construction by an unknown person.<sup>19</sup>

However, in China’s judicial practice, the imposition of liability in equity is not limited to these circumstances.<sup>20</sup> Rather, it is extensive and

5. 王利明, 周友军, 高圣平 [Wang Liming, Zhou Youjun, and Gao Shengping], *中国侵权行为法教程》* [*Textbook on the Tort Liability Law of China*] (Beijing, 2010), 168 [hereinafter Wang et al., *Textbook*]

6. 奚晓明[Xi, Xiaoming], 《中华人民共和国侵权责任法条文理解与适用》 [*Interpretation and Application of the Tort Liability Law of People’s Republic of China*] (Beijing, 2010), 185.

7. Wang et al., *Textbook*, 168.

8. *Ibid.* 169.

9. See *ibid.* 174.

10. *Ibid.* 167.

11. *Ibid.*

12. *Ibid.*

13. *Ibid.*

14. *Ibid.*

15. *Ibid.*

16. *Ibid.*

17. See TLL art. 32.

18. See TLL art. 33.

19. See TLL art. 87.

20. It has been argued that liability in equity is more about sharing the liabilities and losses than about establishing liabilities. So the application of the principle of liability in equity shall not only be limited to the circumstances stipulated by law. See Wang et al., *Textbook*, 177.



with very few limitations. It seems that, when there is a loss and a deep pocket, damage is often awarded in the absence of fault with an eye towards distributive justice and principles of fairness. In a 2011 case, the seller of an electronic car received 20 percent of damage for his personal injury, which was reduced from the trial court's 50 percent award, without proof of either causation or fault on the part of the defendant.<sup>21</sup> After the completion of delivery, without the knowledge or consent of the buyer (a factory), the seller volunteered to carry a part of an electronic car on the factory's premises to facilitate assembly. The part dropped and hit the plaintiff, when he sustained injury. The appellate court held that neither party was at fault, nor did the defendant cause the injury. Nevertheless, the court awarded 20 percent of the damages applying Article 24 of the TLL after taking into account the parties' "actual situations." The unstated reason behind the decision was simple – the defendant had a deep pocket and losses needed to be distributed.

**Xu v. Peng, (2007) 鼓民一初字第212号; (2007) Gu Min Yi Chu Zi No. 212**

In 2006, Ms. Xu, an older person, was knocked down by someone getting off a bus while trying to board the bus. It was alleged that she was lying on the ground until Peng Yu, a twenty-six-year-old man who had just got off the bus, helped her up and took her to the hospital along with her family. At the hospital Mr. Peng gave Ms. Xu RMB 200 yuan. Ms. Xu was diagnosed with a fracture in the cervix of the left thigh bone and hospitalized. She underwent hip replacement surgery. Later, Xu sued Peng for her personal injury and asked recovery for the losses arising out of the medical expenses, nursing fees and nutrition fees along with moral damages for her mental distress. She alleged that Mr. Peng was the person who knocked her over. Among the facts the court considered was a previous police statement of Peng admitting the collision between the two and denying that he knocked Xu down; the undisputed fact was that Peng gave Xu RMB 200 yuan, and that Peng did not bring the Good Samaritan defense until the second session of the trial. According to the judge, in contemporary Chinese society, no person of good heart would have sent an injured person whom he did not know to the hospital and paid the medical expenses out of his own pocket without having caused the injury. The judge reasoned that: "[a]ccording to [the] defendant's statement, he was the first getting off the bus; as a matter of common sense, it is more likely that he was the one who collided with the defendant. If the defendant was simply being a Good Samaritan, he should have caught the actual tortfeasor rather than just helped the defendant up. Also, the defendant should have let the plaintiff's family take her to the hospital. It was not necessary for him to go to the hospital with the victim. What the defendant did was not consistent with the common sense of being a Good Samaritan."

21. See *Hu v. Guanshan Huifu Brick Factory*, (2011)衡中法民一终字第403号[Heng Zhong Fa Min Yi Zhong Zi No. 403 (2011)].

The opinion stated that none of the parties was at fault. It also held that Peng caused the fall of Xu and therefore should be responsible for 40 percent of the damage according to the principle of liability in equity.

**Zhou v. Lv, First Intermediate Court of Beijing, (2016)京01民终495; (2016) Jing 01 Min Zhong No. 495**

Plaintiff, Zhou Shuainan sued defendant, Lv Zhen, for personal injuries inflicted upon him in a basketball game in 2014. During the pick-up basketball game, the defendant, who was playing defense, allegedly knocked the plaintiff over when the plaintiff attempted to score. Plaintiff suffered a bone fracture and went through surgery as a result. Plaintiff sued for medical costs, loss of income for three months, and damage for pain and suffering.

The defendant disputed the fact that there was a physical contact that resulted in the injuries. Further, he argued that an adult should understand the inherent risk of playing basketball, and that the plaintiff had assumed that risk. The defendant only proved the injury but had not established that the defendant's conduct caused the injuries.

Haidian district court (the trial court), found by the preponderance of evidence that the physical contact did occur and that it did cause the injuries. However, basketball is a confrontational sport that carries an inherent danger of causing personal injuries. Both parties are adults who should have anticipated such sports-related injuries. Therefore, plaintiff failed to prove that defendant was at fault. Therefore, the incident was an accident. As neither of the two parties was at fault, the court held each liable for 50 percent of the loss.

The First Intermediary Court of Beijing (the appellate court), reversed the decision and found defendant not liable. The court discussed two issues. The first was whether the defendant should be liable for causing injuries in a competitive sport such as basketball. The answer was no. The appellate court reasoned that competitive sports necessarily entail physical contact and any physical confrontation carries risk of bodily injury. Therefore, it is normal to incur bodily injury in basketball and each participant of the sport should assume the cost of such injuries except where the injuries were the result of an intentional act. Here, since the trial court had found defendant not at fault, he should not be liable on that ground.

The second issue is whether the doctrine of liability in equity applies to sports-related injuries. The answer was also no. The court reasoned that "[l]iability in equity can only be applied in special circumstances such as those in which harm was caused by individuals without civil capacity; in which harm was caused by a tortfeasor who cannot be positively identified and possible tortfeasors share the loss; in which harm was caused by accidents; in which harm was suffered in advancing the interest of the defendant or the collective interest of both parties." ... "Sports are a necessary part of a healthy human life, and they come with the risk of injuries. Such risks should be borne by every consenting

participant of the sport. Allowing recovery under liability in equity in sports injuries will result in a different kind of substantive unfairness and deviates from the principles of tort law. Moreover, allowing recovery will be harmful in all confrontational sports because all participants will feel insecure. Allowing recovery will be harmful to the healthy development of the competitive sports.”

# UNJUST ENRICHMENT

## I. THE PRINCIPLE

### 1. Origins

The Romans did not have a general law of unjust enrichment, any more than they had a general law of contract or tort. They recognized a few specific cases in which a party could be given relief. One was *negotiorum gestio*. A person who performed a service for another who had requested him to do so might be entitled to compensation. He might buy or sell goods for the other person, or pay a debt for him, or repair his roof.<sup>1</sup> He could recover if what he did was reasonable, and if it was reasonable for him to do it himself without asking the other party. Another specific case was that of a person who paid money or delivered goods by mistake, to discharge an obligation that did not exist, and the other party received it in good faith. He could recover on a *condictio indebiti per errorem soluti*.<sup>2</sup> The Romans recognized that unjust enrichment was wrongful: "By nature, it is equitable that no one should be wrongfully enriched at another's expense."<sup>3</sup> But they did not try to explain the meaning of this maxim or why it justified relief in the two situations just described and not in others.

As Robert Feenstra observed, the law of unjust enrichment was first recognized as a distinct body of law, coeval with contract and tort (or delict) in the sixteenth and seventeenth centuries by the philosopher-jurists known as the late scholastics.<sup>4</sup> As mentioned earlier, they were attempting to explain as much as they could of Roman law by the philosophical principles of Aristotle as elaborated by Thomas Aquinas.

The late scholastics describe unjust enrichment as a violation of what Aristotle and Aquinas called "commutative" or "corrective justice."<sup>5</sup> A party who is unjustly enriched has used resources that belong to another person to obtain a benefit to which that person was entitled. For Aristotle and Aquinas, distributive justice ensures that, so far as possible, each citizen has a fair share of whatever resources the society has to divide; commutative, or corrective, justice preserves the share of each citizen. Absent necessity, or some other exception to the normal rules, commutative justice is violated if one person takes or uses another's resources for his own benefit. Aquinas said that one way a person might violate commutative justice is by interfering with another's property in a wrongful manner (*acceptio rei*). If he does so, according to the late scholastics, he commits a

1. Dig. 3.5.3.1; Dig. 3.5.3.21; Dig. 3.5.3.19.

2. Dig. 12.6.

3. Dig. 50.17.206.

4. Robert Feenstra, "Grotius' Doctrine of Unjust Enrichment as a Source of

Obligation: Its Origin and its Influence on Roman-Dutch Law," in E.J.H. Schrage (ed.), *Unjust Enrichment* (1995), 197.

5. Jan Hallebeek, *The Concept of Unjust Enrichment in Late Scholasticism* (1996), 47.

delict or tort. Another way he might violate commutative justice is simply by having what belongs to another (*ipsa res accepta*).<sup>6</sup> Suppose, however, that he no longer has anything that belongs to another. According to the late scholastics, he is still liable if he has thereby become richer. On their approach, that principle is the basis for the law of unjust enrichment.<sup>7</sup> They believed that they had found the true meaning of the famous Roman text, “[b]y nature it is equitable that no one should be made richer by another’s loss.”<sup>8</sup>

In the language of Roman law, a person who has received money paid him by mistake does not have a thing that belongs to another. Even though the money was paid him by mistake, it now belongs to him. The *condictio indebiti per errorem solute* enabled the other party to get it back. To Aquinas, *res accepta* did not merely mean that one person had another’s property. When he said “*restitutio* appears to be nothing else than to reinstate someone in the possession or ownership of his own thing (*res*),”<sup>9</sup> he was not using the language of Roman law but that of Gratian, the founder of medieval Canon law, who was using that of St. Augustine. St. Augustine had said that “the sin is not forgiven unless restitution is made of the thing (*res*) that was taken away.”<sup>10</sup> Gratian explained, “Penance is not done if another’s thing (*res*) is not restored.”<sup>11</sup> Whether someone took another’s money or whether he took another’s horse, on purpose or by accident, Augustine, Gratian, and Aquinas would agree that he had to give it back just as he would have to give back someone’s horse. What mattered was not whether, in the legal sense, he now had another’s thing.

To avoid confusion, the late scholastics sought a more appropriate word. When Vitoria discussed *restitutio* in his commentary on Aquinas, he proposed using the term “right” (*ius*).<sup>12</sup> According to Molina, a right is a “faculty or power to something a man has . . . or to the use something of by his own right.”<sup>13</sup> This was, in fact, the first time jurists had used the word *ius* to mean what common lawyers call “rights” and civil lawyers call “subjective rights.” In Roman law, the word *ius* was used narrowly to refer to a particular right to have something or do something. For example, one could have a variety of rights in the land of another: the right to walk across it (*ius ambulandi*);<sup>14</sup> to drive animals across it (*ius agenda*);<sup>15</sup> to have water flow across it (*ius aquaeductus*);<sup>16</sup> to burn limestone on it (*ius calcis coquendae*);<sup>17</sup> and to take sand from a sandpit (*ius harenae foedienae*).<sup>18</sup>

6. *Summa theologiae* II-II, Q. 62, a. 6.

7. Ludovicus Molina, *De iustitia et iure tractatus* (Venice, 1614), disp. 718, no. 2; Leonardus Lessius, *De iustitia et iure, ceterisque virtutibus cardinalis* (Paris, 1628), lib. 2, cap. 14, dub. 1, no. 3.

8. Dig. 12.6.14; Dig. 50.17.206.

9. *Summa theologiae* II-II, Q. 62 a. 1.

10. Gratian, *Decretum* C. 14 q. 6 c. 1.

11. Gratian, *Decretum* D. G. ante C. 14 q. 6 c. 1 (*Poenitentia non agitur, si res aliena non restituatur*).

12. Francisco de Vitoria, *Commentarios a la Secunda Secundae de Santo Tomas*, (Vicente Beltrán de Heredia, ed., Salamanca, 1932), to II-II Q. 61, a. 1.

13. Molina, *De iustitia et iure* II, disp. I, no. 2.

14. J. 2.3.pr.

15. J. 2.3.pr.

16. J. 2.3.pr.

17. J. 2.3.2.

18. J. 2.3.2.

As Brian Tierney noted, some modern scholars have mistakenly interpreted the new terminology of the late scholastics as a shift from medieval to a modern conception of rights. Instead, "Vitoria's problem was that he could not discuss restitution adequately without considering the concept of *ius* as a subjective right. The definition he had earlier accepted from Aquinas did not include any such concept."<sup>19</sup> In the case of a mistaken payment, it seemed less awkward to say that one person had another's thing, than to say that he had something that belonged to the other by right.

In the seventeenth and eighteenth centuries, the conclusions of the late scholastics were disseminated throughout northern Europe by the members of the northern natural law school founded by Hugo Grotius.<sup>20</sup> Paradoxically, at the same time, the Aristotelian philosophy on which they were based fell from favour. The idea that relief should be given for unjust enrichment endured, while the idea that relief was given for a violation of commutative or corrective justice was forgotten.

## 2. Modern Law

### English Law

#### **Moses v. Mcferlan, (1760) 2 Burr. 1005, 97 Eng. Rep. 676 (K.B.)**

The plaintiff had endorsed a negotiable instrument but the defendant had agreed in writing not to take any action against him. The plaintiff, having been compelled by another court to pay the note notwithstanding the collateral agreement, prevailed.

Lord Mansfield: "If the defendant be under an obligation from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract (quasi ex contractu, as the Roman law expresses it) . . . the gist of this kind of action is that the defendant, on the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

#### **Orakpo v. Manson Investments Ltd., [1978] A.C. 95, 104 (H.L.)**

Lord Diplock. "My Lords, there is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based on the civil law. There are some circumstances in which the remedy takes the form of 'subrogation', but this expression embraces more than a single concept in English law. It is a convenient way of describing a transfer of rights from one person to another, without assignment or assent of the person from whom the rights are transferred

19. Brian Tierney, *The Idea of Natural Rights Studies on Natural Rights, Natural Law, and Church Law 1150–1625* (1997), 259.

20. Feenstra, "Grotius' Doctrine of Unjust Enrichment as a Source of Obligation," 197.



and which takes place by operation of law in a whole variety of widely different circumstances. Some rights by subrogation are contractual in their origin, as in the case of contracts of insurance. Others, such as the right of an innocent lender to recover from a company moneys borrowed ultra vires to the extent that these have been expended on discharging the company's lawful debts, are in no way based on contract and appear to defeat classification except as an empirical remedy to prevent a particular kind of unjust enrichment."

**Note.** It was once thought, as Lord Diplock said, that there was no general claim for unjust enrichment in English law. That opinion has since been rejected, beginning with the following case.

**Lipkin Gorman v. Karpnale. Ltd., [1991] 2 A.C. 548 (H.L.)**

Cass was a partner in the plaintiff firm of solicitors and had authority to operate the firm's client account at the bank. He was a compulsive gambler and without their knowledge he withdrew cash from that account. Cass used that money to fund his gambling at the defendant club. There the cash was exchanged for chips which were used for gambling at the casino and also for payment for refreshments. Although they were used as currency within the club they were worthless and remained the property of the club. Having discovered the truth, the firm sued the club for the amount by which it had profited.

Lord Bridge of Harwich: "With respect to the view that prevailed in the Court of Appeal I cannot see that the respondents ('the club') are in any better position to resist the solicitors' claim to recover the money which Cass stole from them and gambled away in the casino by reason of the fact that cash was exchanged for gaming chips before being wagered at the gaming tables. The club was nevertheless a mere volunteer who gave no consideration for the stolen money. This was the common sense view expressed in the dissenting judgment of Nicholls L.J. Both my noble and learned friends have thoroughly analysed this issue and I agree with the reasoning in both their speeches.

I agree with my noble and learned friend, Lord Goff of Chieveley, that it is right for English law to recognise that a claim to restitution, based on the unjust enrichment of the defendant, may be met by the defence that the defendant has changed his position in good faith. I equally agree that in expressly acknowledging the availability of this defence for the first time it would be unwise to attempt to define its scope in abstract terms, but better to allow the law on the subject to develop on a case by case basis. In the circumstances of this case. I would adopt the reasoning of my noble and learned friend, Lord Templeman, for the conclusion that the club can only rely on the defence to the extent that it limits the club's liability to the solicitors to the amount of their net winnings from Cass which must have been derived from the stolen money."

**Note.** To explain relief for unjust enrichment, English commentators have typically adopted a different approach than that of the late scholastics or the one prevalent in civil law systems. The plaintiff is entitled to a

remedy when the other party's enrichment at his expense is due to an "unjust factor." As classified by Graham Virgo,<sup>1</sup> these comprise:

- plaintiff-oriented grounds of restitution, including
  - absence of intention: the plaintiff has no intention to benefit the defendant, for example, because it was stolen from the plaintiff or the plaintiff lacked the capacity to form an intention;
  - vitiated intention: the plaintiff's intention was the result of mistake, illegitimate pressure, undue influence, or personal handicaps such as minority, dementia, illiteracy;
  - qualified intention: the plaintiff intention was conditional, for example, on receiving a benefit in return, and the condition was not satisfied.
- defendant-oriented grounds of restitution, including
  - exploitation: the defendant was the victim of undue influence or unconscionable conduct;
  - free acceptance: the defendant accepted a benefit, knowing that the plaintiff intended to be paid for it;
- policy-oriented grounds of restitution, for example, *ultra vires*: in the words of Lord Goff, "money paid by a citizen to public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable . . . ."<sup>2</sup> The policy is one of "constitutional principle."<sup>3</sup>

The last two branches of this classification have been criticized. Peter Birks ultimately believed that the second category was unnecessary. Cases of exploitation were really cases of vitiated intent – of "transactional inequality where the nature of the transaction in itself cripples autonomy."<sup>4</sup> "Free acceptance" concerned whether the defendant had been enriched: "it might be, for instance, that on some facts the defendant could not be said to be enriched unless he knew that he was receiving a benefit in expectation of payment."<sup>5</sup> According to some critics, "policy-oriented grounds for restitution" are not "unjust factors," but constitute a residual category with little in common, except that a specific "unjust factor" is hard to identify.<sup>6</sup> Nevertheless, whichever way "unjust factors" are classified, according to the English approach, the plaintiff cannot recover without one.

Birks, a long-time defender of the "unjust factors" approach, changed his mind<sup>7</sup> after Sonja Meier, then a graduate student, drew

1. Graham Virgo, *The Principles of the Law of Restitution* (3rd edn., 2015), 121–5.

2. *Woolwich Equitable Building Society v. IRC* [1993] A.C. 70 (H.L.) 177.

3. Virgo, *Law of Restitution*, 125.

4. Peter Birks, *Unjust Enrichment* (2nd edn., 2005), 106.

5. *Ibid.* 42, 57–8.

6. James Edelman and Elise Bant, *Unjust Enrichment* (Oxford, 2016), ch 13.

7. Birks, *Unjust Enrichment*, 108–13.

attention to the “swaps” cases.<sup>8</sup> Banks had entered into contracts with their clients in which each party would loan the other the same sum of money. One party, however, was to pay interest at a fixed rate; the other at variable rate. The effect of the transaction was to allow one of the parties to assume the risk that interest rates would change. Local public authorities found it advantageous to enter into such contracts as a way of raising immediate capital, whilst leaving the task of repayment to be faced by future taxpayers. However, the contracts were held to be *ultra vires*.<sup>9</sup> Even when a swap contract had been fully executed, banks and public authorities alike had to return the amounts they had received pursuant to them.<sup>10</sup>

Birks and Meier pointed out that the unjust factor cannot have been that the parties’ intentions were conditional on them receiving a benefit that they did not receive. Each party received precisely what it contracted for. Nor can the unjust factor have been a mistake as to whether the contracts were valid because, at the time they were made, they were generally thought to be within the power of the local authorities. In holding that the contracts were *ultra vires*, the courts changed the previously accepted view of the law. It is odd to say that the parties were mistaken as to what the law would later be.<sup>11</sup> To say that, despite the change, the law had always been the same, would be to become entangled in what Birks called “the uncertain metaphysics of mistake.”<sup>12</sup> It would mean that, in order to decide who should recover under the law of unjust enrichment, a court must first resolve an ancient dispute over whether new judicial decisions change the law, or merely declare what it was all along.

It might seem more plausible that the “unjust factor” is a “policy-orientated ground of restitution.” That is how Virgo classified contracts “*ultra vires*.” Birks noted that the courts deciding these cases had not adopted this analysis.<sup>13</sup> Meier argued that “the decisive policy question [is] whether a transfer that is made in accordance with the earlier view of law should be regarded as final – in other words, whether an established line of cases, even if it is later overruled, should be able to constitute a legal ground.”<sup>14</sup> She implied that to decide if there is a “policy oriented ground of restitution” one must first answer that question.

8. Sonja Meier, “Unjust Factors and Legal Grounds,” in *Unjustified Enrichment: Key Issues in Comparative Perspective* (David Johnston and Reinhard Zimmermann, eds., 2002), 37 at 68–9.

9. *Hazell v. Hammersmith & Fulham Borough Council* [1992] 2 A.C. 1 (H.L.).

10. *Kleinwort Benson Ltd v. Sandwell*, [1994] 4 All E.R. 890; *Kleinwort Benson Ltd v. Lincoln City Council* [1999] 2 A.C. 349 (H.L.); *Guinness Mahon & Co Ltd v. Kensington*

& *Chelsea Royal London BC* [1999] Q.B. 115 (C.A.).

11. David Johnston and Reinhard Zimmermann, “Unjustified Enrichment: Surveying the Landscape,” in Johnston and Zimmerman, eds., *Unjustified Enrichment*, 3 at 15.

12. Birks, *Unjust Enrichment*, 113.

13. *Ibid.* 114–15.

14. Meier, “Unjust Factors,” 74.

## Law in the United States

### Restatement of the Law of Restitution, Quasi-Contracts and Constructive Trusts

#### § 1 UNJUST ENRICHMENT

A person who has been unjustly enriched at the expense of another is required to make restitution to the other.

### Restatement (Third) of Restitution and Unjust Enrichment

#### §1 RESTITUTION AND UNJUST ENRICHMENT

A person who is unjustly enriched at the expense of another is subject to liability in restitution.

#### **Comment:**

a. Liability in restitution. Liability in restitution derives from the receipt of a benefit whose retention without payment would result in the unjust enrichment of the defendant at the expense of the claimant. While the paradigm case of unjust enrichment is one in which the benefit on one side of the transaction corresponds to an observable loss on the other, the consecrated formula “at the expense of another” can also mean “in violation of the other’s legally protected rights,” without the need to show that the claimant has suffered a loss. See § 3.

The usual consequence of a liability in restitution is that the defendant must restore the benefit in question or its traceable product, or else pay money in the amount necessary to eliminate unjust enrichment.

The identification of unjust enrichment as an independent basis of liability in common-law legal systems – comparable in this respect to a liability in contract or tort – was the central achievement of the 1937 Restatement of Restitution. That conception of the subject is carried forward here. The use of the word “restitution” to describe the cause of action as well as the remedy is likewise inherited from the original Restatement, despite the problems this usage creates. There are cases in which the essence of a plaintiff’s right and remedy is the reversal of a transfer, and thus a literal “restitution,” without regard to whether the defendant has been enriched by the transfer in question. Conversely, there are cases in which the remedy for unjust enrichment gives the plaintiff something – typically, the defendant’s wrongful gain – that the plaintiff did not previously possess. See Comments *c* and *e*.

Such is the inherent flexibility of the concept of unjust enrichment that almost every instance of a recognized liability in restitution might be referred to the broad rule of the present section. The same flexibility means that the concept of unjust enrichment will not, by itself, yield a reliable indication of the nature and scope of the liability imposed by this part of our legal system. It is by no means obvious, as a theoretical matter, how “unjust enrichment” should best be defined; whether it constitutes a rule of decision, a unifying theme, or something in between; or what role the principle would ideally play in our legal system. Such questions

preoccupy much academic writing on the subject. This Restatement has been written on the assumption that the law of restitution and unjust enrichment can be usefully described without insisting on answers to any of them.

Chapters 2–6 of this Restatement classify the circumstances in which a liability in restitution will predictably be imposed – employing categories that are large enough to be significant, small enough to describe cases that are perceptibly alike. The attempt to make the list comprehensive cannot make it exclusive: cases may arise that fall outside every pattern of unjust enrichment except the rule of the present section. The tradition from which we receive the modern law of restitution authorizes a court to remedy unjust enrichment wherever it finds it, but not to treat as “unjust enrichment” every instance of enrichment that it regards as unjust. See Comment *b* and § 2.

b. Unjust enrichment. The law of restitution is predominantly the law of unjust enrichment, but “unjust enrichment” is a term of art. The substantive part of the law of restitution is concerned with identifying those forms of enrichment that the law treats as “unjust” for purposes of imposing liability.

A significant tradition within English and American law refers to unjust enrichment as if it were something identifiable *a priori*, by the exercise of a moral judgment anterior to legal rules. This equitable conception of the law of restitution is crystallized by Lord Mansfield’s famous statement in *Moses v. Macferlan*, 2 Burr. 1005, 1012, 97 Eng. Rep. 676, 681 (K.B. 1760): “In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.” Explaining restitution as the embodiment of natural justice and equity gives the subject an undoubted versatility, an adaptability to new situations, and (in the eyes of many observers) a special moral attractiveness. Restitution in this view is the aspect of our legal system that makes the most direct appeal to standards of equitable and conscientious behavior as a source of enforceable obligations.

At the same time, the purely equitable account of the subject is open to substantial objections. Saying that liability in restitution is imposed to avoid unjust enrichment effectively postpones the real work of definition, leaving to a separate inquiry the question whether a particular transaction is productive of unjust enrichment or not. In numerous cases natural justice and equity do not in fact provide an adequate guide to decision, and would not do so even if their essential requirements could be treated as self-evident. Unless a definition of restitution can provide a more informative generalization about the nature of the transactions leading to liability, it is difficult to avoid the objection that sees in “unjust enrichment,” at best, a name for a legal conclusion that remains to be explained; at worst, an open-ended and potentially unprincipled charter of liability.

In reality, the law of restitution is very far from imposing liability for every instance of what might plausibly be called unjust enrichment. The

law's potential for intervention in transactions that might be challenged as inequitable is narrower, more predictable, and more objectively determined than the unconstrained implications of the words "unjust enrichment." Equity and good conscience might see an unjust enrichment in the performance of a valid but unequal bargain, or in the legally protected refusal to perform an equal one (as where the statute of limitations bars enforcement of a valid debt). Beyond these merely legal instances, moreover, "unjust enrichment" (in the natural and nontechnical sense of the words) might seem to be a pervasive fact of human experience – given any prior standard (such as equality or merit) by which people's relative entitlements might be measured.

The concern of restitution is not, in fact, with unjust enrichment in any such broad sense, but with a narrower set of circumstances giving rise to what might more appropriately be called *unjustified enrichment*. Compared to the open-ended implications of the term "unjust enrichment," instances of unjustified enrichment are both predictable and objectively determined, because the justification in question is not moral but legal. Unjustified enrichment is enrichment that lacks an adequate legal basis; it results from a transaction that the law treats as ineffective to work a conclusive alteration in ownership rights. Broadly speaking, an ineffective transaction for these purposes is one that is *nonconsensual*. Such a transaction may occur when the claimant's consent to the transaction is impaired for some reason (Chapter 2); or when the claimant confers unrequested benefits without obtaining the recipient's agreement to pay for them (Chapter 3); or when an attempted contractual exchange miscarries after partial performance (Chapter 4); or when the defendant acquires benefits by wrongful interference with the claimant's rights (Chapter 5). A residual set of cases, in which benefits are conferred on the recipient by a third party (rather than by the claimant), is the subject of Chapter 6.

**Note.** Consider whether the authors of the Third Restatement have taken an "unjust factors" approach like most English authors, some other approach, or no distinct approach to the basis of the law of restitution and unjust enrichment.

## German Law

### German Civil Code

#### § 683 COMPENSATION FOR EXPENDITURES

If the undertaking of the affairs of another correspond to the interests or the actual probable will of that person, then the person undertaking these affairs can require compensation for his expenses . . .

#### § 684 RESTITUTION OF ENRICHMENT

If the requirements of section 683 are not met, then the person whose business is conducted is still obligated to pay for the expenses of the person



who conducted them in accordance with the provisions on unjust enrichment ...

#### § 812 BASIC PRINCIPLE

- (1). One who by transfer from another person or in some other way obtains something at that person's expense without legal justification is required to give it up. He is also under this obligation when the legal justification later ceases to exist or when, according to the content of the legal transaction, the purpose of the transfer is not achieved.
- (2). A transfer includes the contractual recognition of the existence or non-existence of an obligation with regard to another.

**Note.** Nineteenth-century German jurists adopted the doctrine of unjust enrichment but not the original explanation. To Friedrich Carl von Savigny, the founder of the German *Pandektenschule*, the principle that “no one should be made richer by another's loss” seemed obviously too broad. Bernhard Windscheid, a leading member of the school, explained that it is a “false abstraction,” “untrue at this level of generality.”<sup>1</sup>

For Savigny and Windscheid, the truth was suggested by another Roman maxim: a person was liable for “a thing which he has without a just basis (*justa causa*).”<sup>2</sup> Windscheid explained that a person enriched at another's expense “has the duty to justify (*herauszugeben*) to the disadvantaged party, why he has become richer.”<sup>3</sup> According to Savigny, the common feature underlying the various remedies the Romans gave for what was later called unjust enrichment: “the enrichment of another from our resources (*Vermögen*) without a legal basis (*Grund*).”<sup>4</sup> *Vermögen* or “resources” is hard to translate. It meant whatever belongs to a person, or, as Savigny put it, “the totality of relationships (*Verhältnisse*) which expand the power of an individual.”<sup>5</sup>

Their approach was adopted by § 812(1) of the German Civil Code, which provides that “one who has received something through another's performance or at his expense in some other way without legal basis (*ohne rechtlichen Grund*) is obligated to give it back.”

In German law, the *Grund* may be that the plaintiff:

- was fulfilling a legal obligation. For example, making a performance due under a contract;
- was making a gift;
- was fulfilling a promise to make a gift that is not enforceable because it was made without the required legal formalities;
- was fulfilling a pre-existing but legal unenforceable obligation, for example:

1. Bernhard Windscheid, *Lehrbuch des Pandektenrechts* (7th edn., 1891), § 421 n. 1.

2. Dig. 25.2.25; Dig. 12.7.1.3.

3. Windscheid, *Lehrbuch*, § 421.

4. Friedrich Carl von Savigny, *System des heutigen römischen Rechts* 1 (1840), 526.

5. *Ibid.* 339.

- paying a debt barred by the statute of limitations (BGB §222(2)), or
- fulfilling a moral duty, such as helping poor relatives (BGB §814), or
- paying a lost wager (BGB §762).

Surprisingly, the most trenchant criticism of this approach was made by German jurists and, in Germany, it has been widely accepted.<sup>6</sup> Walter Wilburg<sup>7</sup> and Ernst von Caemmerer agreed with Savigny and his school that, for relief to be given, it is not enough that one person was enriched at another's expense.<sup>8</sup> They brought up the cases we have already mentioned. As von Caemmerer noted, a person might open a tourist hotel in a hitherto unknown village or build a dam, thereby enhancing the value of neighboring properties.<sup>9</sup> Other jurists pointed out that "enrichment may be due to the display of particular skills in (lawful) competition."<sup>10</sup> More recently, the same argument against the legal basis approach has been made by Kit Barker.<sup>11</sup>

Wilburg and von Caemmerer also rejected Savigny's alternative. Sometimes, a person who is enriched at another's expense is not liable, even though there was no legal basis that justifies the enrichment. Von Caemmerer said, "third parties are advantaged without a contractual or statutory claim to be. But they are not unjustifiably enriched, and there is no action in unjustified enrichment against them."<sup>12</sup>

Von Caemmerer denied that one can formulate a general principle that explains when a plaintiff can recover. One can only identify types of cases in which he is allowed to do so. Building on the work of Wilburg,<sup>13</sup> and without intending to be exhaustive, he described four, major types of case: (1) the plaintiff rendered the defendant a performance (*Leistung*) which was without a legal basis (*Grund*) in the sense that the purpose the plaintiff was pursuing was not achieved; (2) the defendant made an encroachment (*Eingriff*) on the plaintiff's property; (3) the plaintiff incurred expenses (*Impensen*, *Aufwendungen*, today, commonly, *Verwendungen*) improving the defendant's property; and (4) the plaintiff paid another's debt and now claims recourse (*Rückgriff*) against the defendant. Von Caemmerer's classification is found in most German

6. Dieter Reuter and Michael Martinek, *Ungerechtfertigte Bereicherung* (1983), § 2 III.

7. Walter Wilburg, *Die Lehre von der ungerechtfertigten Bereicherung nach österreichischem und deutschem Recht* (Graz, 1934), 5–6.

8. *Ibid.*

9. Ernst von Caemmerer, "Grundprobleme des Bereicherungsrechts," *Gesammelte Schriften* (Hans G. Leser, ed., 1st edn., 1968), 370 at 374–5.

10. Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990), 889.

11. K. Barker, "Responsibility for Gain: Unjust Factors or Absence of Legal Ground? Starting Points in Unjust Enrichment Law," in *Structure and Justification in Private Law: Essays for Peter Birks* (C. Rickett and R. Grantham, eds., 2008), 56, at 57–60.

12. Von Caemmerer, "Grundprobleme," 375.

13. Although Wilburg, unlike von Caemmerer, thought that both a claim for encroachment and a claim for improvements were based on the same underlying consideration: the purpose of establishing property rights. Wilburg, *Lehre von der ungerechtfertigten Bereicherung*, 28.

textbooks and commentaries.<sup>14</sup> It does describe the cases in which German courts give a remedy. Nikolaos Davrados has shown that it also describes when French courts do so.<sup>15</sup>

The issue is whether Wilburg and von Caemmerer were right in saying that these cases are not based on any common principle, and in particular, on the principle that one person cannot be enriched at another's expense absent a legal basis or *Grund*. One criticism of that principle, as we have seen, is that it could not explain why the plaintiff cannot recover when he built a dam or opened a hotel which enriched others, or when his competitor was enriched by luring away his customers. There is no legal basis or *Grund* justifying his enrichment. Another criticism is that, in the four types of cases in which the plaintiff does recover, it is not meaningful to speak of the absence of a legal basis or *Grund* because that term does not have the same meaning in one situation that it does in another. According to Wilburg, a claim arising out of a performance without a legal basis has "nothing to do" with a claim arising out of an encroachment on plaintiff's rights. The performance might concern a *Rechtsgut* like property, but it might not.<sup>16</sup>

More recently, a number of German jurists have claimed that Wilburg and von Caemmerer were wrong. It is a mistake to think that enrichment through receipt of another's performance has no relationship to enrichment through encroachment on another's resources. According to Jan Wilhelm, "the element of unjust enrichment [in these cases] is one and the same."<sup>17</sup> It is "unlawful acquisition (*Haben*) from another's assets."<sup>18</sup> For the critics, however, it remains essential, that this unjust enrichment occurred without a legal basis, or *Grund*.<sup>19</sup> As we will see, their critical points are well taken. But the very reason that leads them to an underlying principle behind the law of unjust enrichment leads further. It shows that the requirement of a legal basis or *Grund* adds nothing to the principle against unjust enrichment: that no one be enriched at another's expense. As the late scholastics understood it, that principle meant that no one should be enriched by using resources that belong to another person to obtain a benefit to which that person was entitled.

14. Zimmermann, *The Law of Obligations*, 890.

15. Nikolaos A. Davrados, "Demystifying Enrichment without Cause," *Louisiana Law Review* 78 (2018), 1256–65.

16. Wilburg, *Lehre von der ungerechtfertigten Bereicherung*, 49–50.

17. Jan Wilhelm, *Rechtsverletzung und Rechtsvermögensentscheidung als Grundlagen und Grenzen des Anspruchs aus*

*ungerechtfertigter Bereicherung* (Bonn, 1973), 173.

18. *Ibid.* 98. Similarly, Manfred Lieb, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch* 5 (4th ed, München, 2004) to § 812 no. 1.

19. Lieb, *Münchener Kommentar* to § 812 no. 7; Berthold Kupisch, *Gesetzespositivismus im Bereicherungsrecht Zur Leistungskondition im Dreit-Personen-Verhältnis* (Berlin, 1978), 503.

**French Law****French Civil Code**

## ARTICLE 1300

Quasi-contracts are purely voluntary actions which result in a duty in a person who benefits from them without having a right to do so, and sometimes a duty in the person performing them towards another person.

The quasi-contracts governed by this sub-title are management of another's affairs, payment of a debt which is not due, and unjustified enrichment.

## ARTICLE 1301

A person who, without being bound to do so, knowingly and usefully manages another's affairs without the knowledge or opposition of the latter (the principal), is subject in accomplishing any juridical acts or physical action which this entails to all the obligations which he would have owed as an agent.

## ARTICLE 1301–2

A person whose affairs have been managed usefully must fulfil any undertakings which the person intervening contracted in his interest.

He must reimburse the person intervening for expenses incurred in his interest and compensate him for harm which he has suffered as a result of the management.

## ARTICLE 1302–1

A person who receives by mistake or knowingly something which is not owed to him must restore it to the person from whom he unduly received it.

## ARTICLE 1303

Apart from the situation of management of another's affairs and undue payment, a person who benefits from an unjustified enrichment to the detriment of another person must indemnify the person who is thereby made the poorer to an amount equal to the lesser of the two values of the enrichment and the impoverishment.

## ARTICLE 1303–1

An enrichment is unjustified where it stems neither from the fulfilment of an obligation by the person impoverished nor from his intention to confer a gratuitous benefit.

**Note.** These provisions were added by Ordonnance no. 2016–131 of February 10, 2016. As originally enacted, the Code recognized an action for the management of another's affairs (arts. 1372, 1375) and for the payment of a debt which is not due (art. 1376). It did not contain a general provision on unjust enrichment. Articles 1303–1303-1 of the Ordonnance added such a provision.

That general provision, however, codified a principle that French courts had recognized since the *Boudier* decision in 1892. The *Cour de cassation* recognized a general right of recovery when “the plaintiff alleges and proves that a benefit has accrued to the defendant at his expense or by his own act.” *Cour de cassation*, ch. req., 15 June 1892, DP 1892.1.596.

The court was following an opinion which nineteenth-century French commentators had endorsed since it had been suggested by Charles Aubry and Charles Rau. Sixteen years after Savigny proposed his solution, Charles Aubry and Charles Rau suggested that his principle underlay the specific remedies of the French Civil Code.<sup>20</sup> Hence the resemblance between the solution in French law and that of the German Civil Code.

## Chinese Law

### General Principles of Civil Law of the People’s Republic of China

#### ARTICLE 92

If gains were acquired improperly and without a legal basis and resulted in another person’s loss, the illegal profits shall be returned to the person who suffered the loss.

### Supreme Court Opinions on the Implementation of GPCL

131. The returned unjustified benefits should include the original object and its fruits (interests). Other benefits from the use of the unjustified benefits should be turned over after the deduction of the cost of labor and overheads. (General Principles of Civil Law is to be superseded by the Chinese Civil Code on January 1, 2021, but the judicial interpretations might remain in force provided that the rules are not contradictory to the Code.)

## Chinese Civil Code

#### ARTICLE 121: MANAGEMENT OF ANOTHER’S AFFAIRS WITHOUT MANDATE

Under the circumstances where there is no statutory or contractual obligation, one who provides management in order to protect the interests of others is entitled to request reimbursement of the necessary costs incurred from the beneficiary.

20. Charles Aubry and Charles Rau, *Cours de droit civil français d’après l’ouvrage allemand de C.-S. Zachariae* (3rd edn., 1856), § 442 bis. The suggestion does not appear in the second edition (Strasbourg, 1844). Very likely, they had read Savigny’s

work in the original. Their treatise began as a translation of one in German by Karl Salomo Zachariae von Lingenthal, *Handbuch des französischen Civilrechts* (1808).

## ARTICLE 122: UNJUST ENRICHMENT

If anyone acquires benefits improperly without any legal basis, the persons who suffers losses shall have the right to request the other party to return the improper gains.

## BOOK III CONTRACTS

## PART III QUASI CONTRACTS

CHAPTER 28 VOLUNTARY MANAGEMENT OF AFFAIRS (*NEGOTIORUM GESTIO*)

## ARTICLE 979

A manager who, without a legal or contractual duty, managed another's affairs in order to avoid harm to person's interest may claim the necessary expense he incurred from the beneficiary; the manager is entitled to request appropriate reimbursement for the loss incurred during the management from the beneficiary.

The manager is not entitled to these rights aforementioned if the management of affairs was against the beneficiary's true wills; however, the rule will not apply when the beneficiary's true wills violates the law or good morals.

## ARTICLE 980

Where the management of affairs does not fit in within these situations, but the beneficiary benefitted from the management, the beneficiary shall fulfil the duty provided by the previous article to pay the necessary expense to the manager within the scope of the interest received.

## ARTICLE 981

In managing another's affairs, manager shall adopt measures that is beneficial to the beneficiary. When it is harmful to the beneficiary to suspend the management, the management shall not be suspended without just cause.

## ARTICLE 982

In managing another's affairs, when it is possible to inform the beneficiary, the beneficiary shall be informed in a timely manner. When the management is not urgently needed, the manager should wait for instructions from the beneficiary.

## ARTICLE 983

When the management ends, the manager shall report on the affairs that he managed to the beneficiary. When manager receives assets from the managed affair, he should transfer it to the beneficiary in a timely manner.

## ARTICLE 984

When the manager's management is ratified by the beneficiary, the rules of contract of mandate will apply to the management from the moment it started, except when the manager has manifested a different intention.



## CHAPTER 29 UNJUST ENRICHMENT

## ARTICLE 985

Where the beneficiary received an unjust benefit without a legal basis, the impoverished party may request the beneficiary to return the benefit except for one of the following circumstances:

- (1). the fulfillment of a moral obligation;
- (2). the payment of a debt before it is due;
- (3). the payment of a debt known to be legally unenforceable.

## ARTICLE 986

The beneficiary is not obligated to return the benefit when he never knew of nor should not have known that he received such a benefit without a legal basis, and that benefit no longer exists.

## ARTICLE 987

Where the beneficiary knew or should have known the benefit he received is without a legal basis, the impoverished party may request the beneficiary to return the benefit and compensate him for the loss.

## ARTICLE 988

Where the benefit has already been given to a third party gratuitously, the impoverished party may request the third party to assume the obligation to return the benefit within the scope (of the gift).

**Note.** As Peter Birks noted, “the ‘legal basis’ approach, so different on its surface, nearly always comes to the same conclusions as the common law reaches through its analysis of unjust factors.”<sup>1</sup> The difference is that the two approaches provide two different explanations of why a remedy is given. In the classic English case of *Kelly v. Solari*, a company that had insured Mr Solari’s life paid his widow when he died. It later discovered that it had not been liable to pay under the policy. It could recover the amount that it had paid. Parke B observed:

[If the money] is paid under the impression of the truth of a fact which is untrue it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact. In such a case, the receiver was not entitled to it, nor intended to have it.<sup>2</sup>

Birks asked:

Does the claimant recover because he did not intend to enrich the recipient or because on the true facts the recipient was not entitled to the enrichment? One easily assumes that these are two sides of one penny, but in the marginal case it matters where the emphasis is put.

1. Peter Birks, *Unjust Enrichment* (2nd edn., 2005), 104.

2. (1841) 9 M & W 54, 59, 152 E.R. 24, 27.

The common law has, until recently, looked chiefly for the incomplete intent. Civilian systems emphasise disentitlement.<sup>3</sup>

This case also illustrates the difference between the common law and civilian approaches, on the one hand, and the late scholastic approach on the other. According to the late scholastics it is enough that the defendant was enriched at the plaintiff's expense. For the two modern approaches, that principle seems too broad. As von Caemmerer noted, a person might open a tourist hotel in a hitherto unknown village or build a dam, thereby enhancing the value of neighboring properties.<sup>4</sup> Other jurists pointed out that "enrichment may be due to the display of particular skills in (lawful) competition."<sup>5</sup> Therefore some other element is necessary: an "unjust factor" or the absence of a "*Grund*." For the late scholastics, however, the principle against unjust enrichment meant that one was liable for a benefit obtained *res aliena accepta*, by appropriating what rightfully belonged to another. Those who benefit from another's hotel or dam or who compete with him successfully are not appropriating anything to which he has a right.

## II. MUST ONE PARTY GAIN AT THE OTHER'S EXPENSE?

### 1. Recovery When the Plaintiff Did Not Lose

#### a. The Use or Violation of Another's Property Rights

##### English Law

#### **Phillips v. Homfray, (1883) 24 Law Reports 439 (Ch. Div.)**

The defendants took coal and ironstone from their own land but conveyed it away through tunnels and passages beneath the land of another person. He died, and those who inherited his estate brought suit.

Baggallay L.J.: "That it is in form an action in the nature of a claim for trespass, the damages for which were to be measured by the amount of wayleave which the Defendants would have had to pay for the use of Plaintiff's ways and passages, cannot be disputed. But [the judge below] was of the opinion that this was one of the class of cases in which a deceased man's estate remains liable for a profit derived out of his wrongful acts during his lifetime . . .

The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another,

3. Birks, *Unjust Enrichment*, 102.

4. Ernst von Caemmerer, "Grundprobleme des Bereicherungsrechts," *Gesammelte Schriften*, (Hans G. Leser, ed., 1st edn., 1968), 370 at 374–5.

5. Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990), 889.

have been appropriated by the deceased person and added to his estate or moneys.”

The court denied recovery because it held that was not the case here.

### **Swordheath Properties Ltd v. Tabet, [1979] 1 W.L.R. 285**

A landlord let a flat to a tenant for a fixed term. His tenancy came to an end before this term expired. The defendants then lived in the flat. The lower court held that while the landlord could recover any damages he suffered from them, he could not recover rent without showing that he otherwise would have rented the flat to someone else.

Megarry J.: “[C]ounsel for the plaintiffs has referred us to a decision of Lord Denning MR (sitting as an additional judge of the Queen’s Bench Division) in *Penarth Dock Engineering Co Ltd v. Pounds* [[1963] 1 Lloyd’s Rep 359]. In his decision in the case, so far as the question of damages arose, Lord Denning MR had no hesitation in saying that the plaintiffs, even though they would not themselves have made use, bringing in financial return, of the dock in respect of which the trespass was committed, were nevertheless entitled to damages for that trespass, calculated by reference to the proper value to the trespassers of the use of the property on which they had trespassed, for the period during which they had trespassed.

It appears to me to be clear, both as a matter of principle and of authority, that in a case of this sort the plaintiff, when he has established that the defendant has remained on as a trespasser in residential property, is entitled, without bringing evidence that he could or would have let the property to someone else in the absence of the trespassing defendant, to have as damages for the trespass the value of the property as it would fairly be calculated; and, in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of damages.”

### **Law in the United States**

#### **Raven Red Ash Coal Co. v. Ball, 39 S.E. 2d 231 (Va. 1946)**

The defendant, a coal company, built a small railway across plaintiff’s land and, for years, hauled coal across it.

“The illegal transportation of the coal in question across plaintiff’s land was intentional, deliberate and repeated from time to time for a period of years. Defendant had no moral or legal right to enrich itself by this illegal use of plaintiff’s property. To limit plaintiff to the recovery of nominal damages for the repeated trespasses will enable the defendant, as a trespasser, to obtain a more favorable position than a party contracting for the same right. Natural justice plainly requires the law to imply a promise to pay a fair value for the benefits received. Defendant’s estate has been enhanced by just this much.”

#### **Olwell v. Nye & Nissen Co., 173 P.2d 652 (Wash. 1946)**

“It appears that the plaintiff arranged for and had [an egg washing machine] stored in a space adjacent to the premises of the

defendant but not covered by its lease. Due to the scarcity of labor immediately after the outbreak of the war, the defendant's treasurer, without the knowledge or consent of the plaintiff, ordered the egg washer to be taken out of storage. The machine was put into operation by defendant on May 31, 1941, and thereafter, for a period of three years, was used approximately one day a week in the regular course of the defendant's business ...

It is argued by the plaintiff that, since the machine was put into storage by respondent, who had no present use for it, and for a period of almost three years did not know that appellant was operating it, and since it was not injured by its operation ... the respondent was not damaged since he is as well off as if the machine had not been used by the appellant.

The very essence of the nature of property is the right to its exclusive use. Without it, no beneficial right remains. However, plausible, the appellant cannot be heard to say that its wrongful invasion of the respondent's property right to exclusive use is not a loss compensable in law. To hold otherwise would be subversive of all property rights, since its use was admittedly wrongful and without claim of right. The theory of unjust enrichment is applicable in such a case."

### **French Law**

#### **Cour de cassation, ch. req., December 11, 1928, D.H. 1929.18**

A water company utilized a pipe belonging to the plaintiff to distribute water to its other customers. The plaintiff sought compensation for the use of its pipe.

"As to the violation of the principle of unjust enrichment ...

[T]he decision under attack declares that the Water Company from Ms. Matitia by using her pipe to distribute water to other users who paid a price for it ... [I]n deciding that the company owed compensation to Ms. Matitia for the use it made of her pipe, the decision merely applied the principle that no one can be enriched at another's expense." Therefore, the water company is liable.

### **German Law**

#### **Reichsgericht, Dec. 20, 1919, RGZ 97, 310**

The defendant built a small railroad across plaintiff's property which it used to haul its goods. The plaintiff sued for unjust enrichment.

"The findings of the appellate court as to the plaintiff's right to recover for unjust enrichment are justified ... It is clear from the letters of the plaintiff of 27 July 1911 that the plaintiff need only suffer this use if he were paid an appropriate compensation ... If the defendant is enriched at the expense of the plaintiff insofar as it must in the ordinary course of affairs pay an appropriate compensation for its unlawful use, it has saved this sum, and the plaintiff has therefore lost it."

### **b. The Question of What the Defendant Should Pay**

Suppose, as in some of the cases just described, the defendant would have had no alternative but to deal with the plaintiff. Is the plaintiff then entitled to any amount he could have forced the defendant to pay? The problem is illustrated by the following English case.

#### **Wrotham Park Estate Company v. Parkside Homes Ltd, [1974] 1 W.L.R. 798 (Ch. Div.)**

Land was sold subject to a covenant that any buyer would develop the land only in accord with a development plan approved by the seller.

“On 14th February the plaintiffs issued a writ against Parkside. The relief sought was an injunction to restrain Parkside from building on the allotment site other than in accordance with a layout plan approved by the plaintiffs and a mandatory injunction for the demolition of any buildings erected in breach of the stipulation. The issue of the writ and the service of the statement of claim a fortnight later did not deter Parkside. Holding deposits had been accepted in respect of all 14 houses (although no contracts had been signed) and building works proceeded . . .

I turn first to the nature, scope and purpose of the layout covenant. In terms it is an absolute prohibition against development for building purposes except in strict accordance with a layout plan approved by the vendor, the sixth earl, or his surveyors. No point was taken before me that the stipulation was personal to the sixth earl and died with him. Counsel on both sides accepted that the word ‘vendor’ in the stipulation must, as a matter of construction, be capable of including successors in title. Counsel for the plaintiffs submitted that a layout plan was one which indicated the position of houses, that is to say density and arrangement of buildings and the position of roads, and also in the context of this particular stipulation, the line of sewers and drains. He conceded that the covenantee would have no right under such a stipulation to refuse approval unreasonably, and in particular, that the stipulation could not lawfully have been used as a bargaining counter in order to demand money from Mr Blake as the price for allowing him to develop. The plaintiffs were not able to produce any application by Mr Blake for approval of a layout plan or any copy of an approval granted to him . . .

I turn to the consideration of the quantum of damages. I was asked by the parties to assess the damages myself, should the question arise, rather than to direct an enquiry. The basis rule in contract is to measure damages by that sum of money which will put the plaintiff in the same position as he would have been in if the contract had not been broken. From that basis, the defendants argue that the damages are nil or purely nominal, because the value of the Wrotham Park estate (as the plaintiffs concede) is not diminished by one farthing in consequence of the construction of a road and the erection of 14 houses on the allotment site. If, therefore (the defendants submit), I refuse an injunction I ought to award no damages in lieu. That would seem, on the face of it, a result of questionable fairness on the facts of this case. Had the offending development been the erection of an

advertisement hoarding in defiance of protests and writs, I apprehend (assuming my conclusions on other point to be correct) that the court would not have hesitated to grant a mandatory injunction for its removal. If, for social and economic reasons, the court does not see fit in the exercise of its discretion, to order demolition of the 14 houses, is it just that the plaintiffs should receive no compensation and that the defendants should be left in undisturbed possession of the fruits of their wrongdoing? Common sense would seem to demand a negative answer to this question. A comparable problem arose in wayleave cases where the defendant had trespassed by making use of the plaintiff's underground ways to the defendant's profit but without diminishing the value of the plaintiff's property. The plaintiff in such cases received damages assessed by reference to a reasonable wayleave rent. This principle was considered and extended in *Whitwham v. Westminster Brymbo Coal and Coke Co* [[1896] 2 Ch 538.] For six years the defendants wrongfully tipped colliery waste on to the plaintiff's land. At the trial the defendants were directed to cease tipping and to give up possession. The question then arose what damages should be awarded for the wrongful act done to the plaintiff during the period of the defendant's unauthorised user of the land. The official referee found that the diminution in the value of the plaintiff's land was only £200, but that the value of the plaintiff's land to the defendants in 1888 for tipping purposes for six years was some £900. It was held that the proper scale of damages was the higher sum on the ground that a trespasser should not be allowed to make use of another person's land without in some way compensating that other person for that user.

In my judgment a just substitute for a mandatory injunction would be such a sum of money as might reasonably have been demanded by the plaintiffs from Parkside as a quid pro quo for relaxing the covenant. The plaintiffs submitted that that sum should be a substantial proportion of the development value of the land. This is currently put at no less than £10,000 per plot, i.e. £140,000 on the assumption that the plots are undeveloped. Mr Parker gave evidence that a half or a third of the development value was commonly demanded by a landowner whose property stood in the way of a development. I do not agree with that approach to damages in this type of case. I bear in mind the following factors: (1) The layout covenant is not an asset which the estate owner ever contemplated he would have either the opportunity or the desire to turn to account. It has no commercial or even nuisance value. For it cannot be turned to account except to the detriment of the existing residents who are people the estate owner professes to protect. (2) The breach of covenant which has actually taken place is over a very small area and the impact of this particular breach on the Wrotham Park estate is insignificant. The validity of the covenant over the rest of area 14 is unaffected. I think that in a case such as the present a landowner faced with a request from a developer which, it must be assumed, he feels reluctantly obliged to grant, would have first asked the developer what profit he expected to make from his operations. With the benefit of foresight the developer would, in the present case, have said about £50,000, for that is the profit which Parkside concedes it made from



the development. I think that the landowner would then reasonably have required a certain percentage of that anticipated profit as a price for the relaxation of the covenant, assuming, as I must, that he feels obliged to relax it. In assessing what would be a fair percentage I think that the court ought, on the particular facts of this case, to act with great moderation. For it is to be borne in mind that the plaintiffs were aware, before the auction took place, that the land was being offered for sale as freehold building land for 13 houses, and the plaintiffs knew that they were not going to consent to any such development. The plaintiffs could have informed the urban district council of their attitude in advance of the auction or could have given the like information to Parkside prior to completion of the contract for sale. In either event it seems highly unlikely that Parkside would have parted with its £90,000, at any rate unconditionally. I think that damages must be assessed in such a case on a basis which is fair and, in all the circumstances, in my judgment a sum equal to 5 per cent of Parkside's anticipated profit is the most that is fair. I accordingly award the sum of £2,500 in substitution for mandatory injunctions. I think that this amount should be treated as apportioned between the 14 respective owners or joint owners of the plots and Parkside (as the owner of the road) in 1/15th shares, so that the damages awarded will be £166 odd in each case. In fact, I apprehend that by virtue of the arrangement between Parkside and the insurance office the entirety of the £2,500 will ultimately be recoverable from Parkside, so that the apportionment does not have any real significance. I will also grant a declaration in appropriate terms after I have heard submissions from counsel as to such terms."

## **2. Recovery When It Is Doubtful What the Defendant Gained**

### **Anglo-American Law**

#### **Ramsden v. Dyson, [1866] L.R. 1 H.L. 129**

A tenant spent over £1,800 on land that he had leased. His lease was short term but he believed that by building he became entitled to a sixty year lease. He was wrong, and his landlord evicted him. The House of Lords denied the tenant compensation on the grounds that the landlord had not known or encouraged the tenant to make the improvements. Lord Cransworth did note that the result would have been different if he had.

"If a stranger begin to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully

passive on such an occasion, in order afterwards to profit by the mistake that I could have prevented.”

**Greenwood v. Bennett, [1973] 1 Q.B. 195 (C.A.)**

Harper spent £226 repairing a car which he bought in good faith but which in fact had been stolen.

Lord Denning. “I should have thought that the county court judge here should have imposed a condition on Mr Bennett’s company [the owner of the car]. He should have required them to pay Mr Harper the £226 as a condition of being given delivery of the car. But the judge did not impose such a condition. They have regained the car, and sold it. What then is to be done? It seems to me that we must order them to pay Mr Harper the £226 for that is the only way of putting the position right.

On what principle is this to be done? Counsel for Mr Bennett has referred us to the familiar cases which say that a man is not entitled to compensation for work done on the goods or property of another unless there is a contract express or implied to pay for it. We all remember the saying of Pollock CB: ‘One cleans another’s shoes. What can the other do but put them on?’ [citation omitted] That is undoubtedly the law when the person who does the work knows, or ought to know, that the property does not belong to him. He takes the risk of not being paid for his work on it. But it is very different when he honestly believes himself to be the owner of the property and does the work in that belief. (That distinction is drawn in the mining cases such as *Wood v. Morewood* and *Livingstone v. Rawyards Coal Co* [citations omitted].) Here we have an innocent purchaser who bought the car in good faith and without notice of any defect in the title to it. He did work on it to the value of £226. The law is hard enough on him when it makes him give up the car itself. It would be most unjust if Mr Bennett’s company could not only take the car from him, but also the value of the improvements he has done to it – without paying for them. There is a principle at hand to meet the case. It derives from the law of restitution. Mr Bennett’s company should not be allowed unjustly to enrich themselves at his expense. The court will order them, if they recover the car, or its improved value, to recompense the innocent purchaser for the work he has done on it. No matter whether they recover it with the aid of the courts, or without it, the innocent purchaser will recover the value of the improvements he has done to it.”

**Torts (Interference with Goods) Act 1977**

§ 6 (1)

In proceedings for wrongful interference against a person (the “improver”) who has improved the goods, if it is shown that the improver acted in the mistaken but honest belief that he had good title to them, an allowance shall be made to the extent to which, at the time as at which the goods fall to be valued in assessing damages, the value of the goods is attributable to the improvement.

**Jensen v. Probert, 148 P.2d 248 (Ore. 1944)**

"The plaintiff Jensen was owner in fee of the Probert tract. The plaintiffs were neither guilty of negligence, fraud or bad faith nor did they take any affirmative action tending to mislead Probert or his purported predecessors in title. Probert, acting in good faith and without negligence and reasonably believing himself to be the owner of the Probert tract, built thereon a small house. Did the court [below] err in imposing a lien on the plaintiff's land for the sum of \$1,500? ...

By the early American and English common law, the true owner might recover his land in ejectment without incurring any liability to pay for improvements by an occupier, even though the latter acted in good faith believing himself to be the owner ...

On the other hand, it is firmly established by the weight of authority that where the occupant in good faith believes himself to be the owner and makes improvements which enhance the value of the property, and where the true owner seeks relief in a court of equity, the equitable maxim will apply and the court will grant relief only upon condition that the appropriate restitution is made to the occupier."

Here, however, the plaintiff's claim was denied because the owner of the property did not want the small house. He wanted it to be removed.

**German Law****German Civil Code**

## § 994

(1) The possessor can require compensation from the owner for the expenses necessary for the upkeep of the object ...

## § 996

The possessor can claim compensation for other expenses that were not necessary ... only insofar as they have increased the value of the object at the time the owner receives it.

**Bundesgerichtshof, Oct. 31, 1963, BGHZ 40, 272<sup>1</sup>**

The plaintiff built several buildings on defendant's land and hired a firm to install electrical fixtures in them. The appellate court concluded that the defendant acquired title to the appliances when they were installed, independent of any contractual obligation.

"The appellate court must be followed in its view that the plaintiff was the owner of the appliances until the moment when they were installed in defendant's building, so that the plaintiff lost title by this installation ...

1. Excerpt from the translation by Kurt Lipstein in B.S. Markesenis, W. Lorenz, and G. Dannemann, *The German Law of*

*Obligations* vol.1 The Law of Contracts and Restitution (1997).

[T]he reference to unjust enrichment implies that a restitutionary claim does arise only under the requirements set forth in § 812 I BGB (BGHZ 35, 356, 359 [other citations omitted]). This position is also shared by the Appeal Court. What matters therefore is whether the defendant received the enrichment, which consists of the installed appliances, by performance of the plaintiff, or in any other way, without legal ground (§ 812 I 1 BGB).

The installation of the appliances cannot be considered as performance by the plaintiff. It was carried out by the B. firm, and this firm owed both installation and appliances to the defendant on the basis of the contract which this firm had concluded with the defendant, the Appeal Court states ...

By judgment of 5 October 1961 (VII ZR 207/60, BGHZ 36, 30), this present Senate denied a claim in unjust enrichment to a client who was similar to the present one. In this case, an owner of real property had instructed a company to construct a building for a certain price. The company had, in turn, instructed a building contractor to erect the building. The present Senate decided that the building contractor had no claim in unjust enrichment against the owner of the real property even if the building contractor's contract with the company were void ...

On this point, the Senate stated that the direct shift of wealth from the building contractor onto the owner of the real property, which was necessary for a restitutionary claim, was lacking. For the owner, the increased value of the property was not a transfer of value by the building contractor, but by his contractual partner, the company."

### **Bundesgerichtshof, Jan. 7, 1971, NJW 1971, 609<sup>2</sup>**

The defendant flew from Munich to Hamburg, having bought a ticket for that flight. He then managed to reenter the plane and continue on to New York. He was refused entry because he did not have a visa. Again without having purchased a ticket, he was returned to Munich. The plaintiff airline, which had transported him to New York and then back again to Munich, sued for the price it would have charged him for tickets.

"[I]t seems entirely appropriate and even necessary, to transfer those principles which decide whether or not the enrichment has survived, and to apply them to whether there has been an initial enrichment, provided the interests involved are the same. This is at least necessary if such a transfer can solve inconsistencies within the law of unjust enrichment, which would arise if one were to apply different requirements to the survival of an enrichment on the one hand, and to the existence of an initial enrichment on the other, even

2. Excerpt from the translation by Kurt Lipstein in B.S. Markesenis, W. Lorenz, and G. Dannemann, *The German Law of Obligations* vol.1 The Law of Contracts and Restitution: A Comparative Introduction (1997).

if no convincing reasons can be found for such different treatment. In these situations, considerations of equity alone – which have a particularly strong influence on the law of unjustified enrichment (cf. BGHZ 36, 232, 235) – require that necessary adjustments be made.

It has been set out above that an enriched party who is aware of the lack of a legal cause when receiving the enrichment, is generally not allowed to rely on a subsequent disappearance of this initial enrichment. In this situation, there seems to be no reason why the same person, under the same conditions, should be allowed to deny the very accrual of an enrichment. This should at least not be permitted if the enrichment in question – as in this case – consists in the saving of expenses for extraordinary matters which the enriched party would or even could not otherwise have afforded.”

### **Bundesgerichtshof, July 14, 1956, BGHZ 21, 319**

The defendant continually parked her car in a public parking lot. The parking lot had posted a sign indicating the charge for parking was 25 DM. The defendant insisted she should be allowed to park for free. The court held that she was liable for the parking fee but on a strange ground.

“Principally, in his essay ‘On Contractual Relations Based on Fact,’ (Festschrift der Leipziger juristischen Fakultät für Siber Band II S 1), in a partial reversal of a concept that often works correctly in commercial life – that a contract can only come into existence through an offer and acceptance – he showed that there are contractual relation based on facts, which do not depend on the conclusion of a contract, but on a relationship of social performances of which a good example is the obligations of drivers on the highway to each other.”

The court held the defendant liable because a contract had been formed in this way here.

**Note.** Part of the problem in the last case is how to hold the defendant liable, not for the amount he was benefited, or would have been willing to pay, but for the amount the defendant knew the plaintiff would charge. The court solved the problem by finding there was a contract – even though the normal requirements for a contract were not satisfied. American courts have sometimes done something similar. If that is rationale, however, sometimes American courts have gone too far. In *Louisville Tin & Stove Co. v. Lay*, 65 S.W.2d 1002 (Ky. 1933), Mrs. Lay and her husband each owned and operated a business. Mr. Lay, who was insolvent and without credit, ordered goods from the plaintiff to be delivered to his wife’s store. When she was informed that the goods had arrived at the railway depot, she “became angry and said it was her husband’s doings.” She ordered a drayman to take the goods to his shop. The court held that her acts in taking control over the goods constituted the acceptance of a contract.

### Chinese Law

**Fuzhen Construction, LLC v. Nanchang Municipal Construction, LLC**, 江西省福振路桥建筑工程有限公司诉南昌市市政建设有限公司  
**Supreme People's Court (2017) 最高法民再287号; (2017) Zui Gao Fa Min Zai No. 287**

Fuzhen Construction (FZ) sued to have Nanchang Municipal Construction (Municipal) return the RMB 6 million yuan they unjustly received from FZ. Both FZ and Municipal were defrauded by and in a business relationship with a con man, Xin Guoqiang (Xin). Xin made FZ believe that they were proposing a bid for a drainage work construction project solicited by Municipal. Xin made Municipal believe that they were proposing a bid for a highway construction project. Both projects were fictitious. Following Xin's instruction, FZ wired 6 million yuan into Municipal's account as security deposit for the bid. Municipal received the funds and wired the funds to Xin's company as instructed the next day.

The Provincial High Court of Jiangxi ruled in favor of FZ and ordered Municipal to return the funds and interests generated. The Supreme Court reopened the case and decided on two issues: whether unjust enrichment exists and, if so, whether Municipal is obligated to return the money along with interests to FZ.

The Supreme Court held that it was unjust enrichment based on Article 92 of GPCL 1986, Supreme Court Opinion, section 131, and Article 122 of General Provisions of Civil Law. The court reasoned that "the finding of unjust enrichment demands the following elements: one party has to be enriched; the enrichment must not have a legal basis; the benefit resulted from the loss of another party; there must be causation (between the two incidents) . . . ." The enrichment of Municipal and loss of FZ can be supported by facts. Such an enrichment arose from the fictitious partnership relationship between FZ and Xin, which was part of the fraudulent and illegal scheme of Xin. Therefore, there was no legal basis for the enrichment. The court turned to the causation and held that both incidents (enrichment and loss) stemmed from the criminal activities of Xin, and there is causation between the two incidents. Therefore, unjust enrichment can be found.

The court went on to ask whether any unjust enrichment shall be returned regardless of the existence of fault of the *bona fide* receiver of the gains.

The court reasoned that "[t]he law does not tell us how to ascertain the scope of unjust enrichment when the object received perishes, is destroyed or is otherwise impossible to return. However, not everything that is not regulated by law should be necessarily regarded as a legal loophole . . . We ought to consider whether the loophole departs from the legislative intent of the legal rules . . . ."

The court opined that: "[I]f we are not allowed to consider the mental malice in unjust enrichment, we are bound to confuse the elements of unjust enrichment with its legal effects and violate the legislative intent



and values that the law represents in adjusting the unjust allocation of wealth.”

The court held that when the receiver acted in good faith, the scope of the refund shall be limited to the existing benefit, which in this case no longer exists. (The fund was no longer in Municipal's possession from the day after.) As a result, Municipal is not obligated to return the 6 million yuan received from FZ, none of which is an existing benefit.

### **3. Denial of Recovery When the Plaintiff Lost and the Defendant Gained: Chinese Law**

On the problem of the stripping of assets of Chinese state-owned enterprises, see above pp. 147–152.

**Construction Bank of China v. Jiada Investment, LLC**, 中国建设银行股份有限公司佛山分行与佛山市嘉达投资有限公司不当得利纠纷再审案 **High Court of Guangdong Province (2009)** 粤高法审监民提字第10号 (2009) **Yue Gao Fa Shen Jian Min Ti Zi No. 10**

The state-owned Construction Bank of China (CBC) sold non-performing assets in the form of unpaid creditor's rights to a state-owned asset management company, Xinda Corp. Xinda later sold these creditor's rights to Jiada Investment. After the first transaction, CBC sold some properties that they had received from the debtors to reduce the amount of the debts, one of which belonged to the assets sold to Xinda. When Jiada took over the creditor's rights of the assets, they found out about the fact that one property was sold. They sued CBC for unjust enrichment to collect either the property or its market value. CBC claimed that the dispute arose out of the contract between them and Xinda, to which Jiada is not privy, and therefore has no standing. Moreover, the property was sold before Xinda and Jiada entered into their agreement so Jiada could not have acquired any rights against CBC. Also, CBC argued that the suit is barred according to a Supreme Court Reply regarding whether courts should hear disputes arising out of financial assets purchase agreements between state-owned banks and asset management companies. According to the Reply, they should not do so for policy reasons. In addition, CBC argued that the contract between Xinda and Jiada is tantamount to stripping of state assets as 500 million yuan worth of assets were sold at 3.7 percent of their value. If CBC were found liable, Jiada would earn a profit of 20 million yuan, which would result in a correspondingly heavy loss of state assets. In the appeal, CBC went further to admit that Xinda might have a pre-contractual liabilities claim against them but argued that this claim cannot be raised by Jiada. CBC was backed by a protest lodged by the provincial prosecutor's office.

The Guangdong High Court dismissed the unjust enrichment claim, relying on the Supreme Court's Reply. CBC began stripping state non-performing assets to state-owned asset management companies massively since 1999 during a large-scale state financial reform. According to the prosecutors' argument, it is permissible that the creditor's rights transferred under this policy scheme have flaws. The court further explained that although, according to the Reply, CBC is immune from lawsuits. Jiada could exercise its contractual rights against either the debtors or Xinda.

# **THE LAW OF PROPERTY**

